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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT REICHELT, CATHERINE PELLETIER, PAUL S. JUZWISHEN, ALLEN A. MICHEWICH, FRANK A. MISIEWICZ, WILLIAM J. MUELLER, JOSEPH M. SCAVONE, LINDA A. SHINGARA, JOHN D. SWEENEY, HENRY W. WAJDOWICZ, and All Class Members,

Petitioners,

VS.

EMHART CORPORATION, USM CORP., and ROYAL E. COWLES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In fashioning a federal common law of contracts for employee "welfare benefit" claims under ERISA (which contains very little substantive law applicable to such plans), should the federal courts use a consensus of state court common law decisions as a guide or should they continue, in the name of "preemption" to totally ignore those decisions despite this Court's opinion in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989)?

2. Under the appropriate contract law are ERISA "welfare benefits" merely gratuitous promises which the employer may retroactively amend or revoke whenever it wishes?

3. Should the ambiguities of a *de facto* oral ERISA plan be resolved against the employer where the employer admitted it had knowingly and intentionally ignored ERISA's procedural requirements that the plan be in writing with unambiguous language and fully disclosed to its employees?

4. Are the Second Circuit and some other federal courts complying with the guidelines in *Firestone v. Bruch, supra*, for choosing between the *de novo* and the arbitrary and capricious standards of judicial review?

PARTIES TO THE PROCEEDINGS

All of the petitioners are former salaried employees of the corporate respondents. Individual actions were brought by nine of them, namely Robert Reichelt, Paul S. Juzwishen, Allen A. Michewich, Frank A. Misiewicz, William J. Mueller, Joseph M. Scavone, Linda A. Shingara, John D. Sweeney, Henry W. Wajdowicz. These actions were consolidated by the district court with a duly certified class action which was also then pending in the district court on behalf of other similarly situated Emhart employees. The remaining 211 petitioners are the members of that class, and Catherine Pelletier is the duly designated representative of the class.

The respondents are Emhart Corporation, USM Corp., which is its wholly owned subsidiary, and Royal E. Cowles who was Emhart's Vice President for Human Resources. After the events giving rise to this litigation, in a separate and unrelated transaction, Emhart Corporation was acquired by The Black & Decker Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit. This judgment involves significant questions under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq.

OPINIONS BELOW

The opinion of the United States District Court for the District of Connecticut (A23-A36) which granted respondents' motion

for summary judgment and denied petitioners' cross motion is unpublished. The opinion of the United States Court of Appeals for the Second Circuit (A1-A22), which affirmed the district court is reported at 921 F.2d 425 (2d Cir. 1990). (Both opinions are reprinted in the appendix.)

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1990. By order of February 1, 1991, the Court of Appeals denied a petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

(Reprinted in the appendix)

ERISA, 29 U.S.C. §§ 1001 et seq.:

29 U.S.C. §§ 1021(a) (disclosure and reporting duty; § 1022 (summary plan description, contents and use of understandable language); § 1024(b) (publication of plan description and of any material modifications); §§ 1102(a)(1) and (B)(3) (Plan to be in writing and contain amendment procedure); §§ 1132(a)(1)(B) and (a)(3)(B) (civil enforcement) § 1133 (procedure for denying claims); § 1140 (interference with protected rights); §§ 1144(a) and (c) (preemption).

ERISA Regulations:

29 C.F.R. § 2520.102-2: (clear unambiguous language required)

STATEMENT OF THE CASE

1. Summary of the Facts

The petitioners ("the plaintiffs") are 220 long time former employees of the defendants' Farrel division plant in Ansonia, Connecticut. Farrel was a division of the defendant USM. USM was a wholly owned subsidiary of the defendant Emhart. Emhart was an international conglomerate based in Farmington, Connecticut.

Plaintiffs are seeking $4 million of severance pay due, they claim, under ERISA when their employment by the defendants was "terminated" (word used in the defendant's records) in May 1986. At that time all the assets of the Farrel division were sold as two separate going concerns, the "roll shop" and the "machine shop" to two separate purchasers. One of the purchasers was headquartered in Germany. The other was a new investment syndicate with no prior operating experience. On the next business day after the closings all of the plaintiffs were hired by one or the other of the two purchasers, depending on whether they had been formerly employed in the roll shop or the machine shop. Their work and pay were substantially the same, but their benefits were reduced, among other things, neither of the purchasers offered any severance plan or severance pay credit for prior years of service at Farrel.

Severance pay at Farrel had been the same as the industry norm, namely at least one week's pay for each year of service. As a result of the termination of their employment by the defendants plaintiffs permanently lost their existing credits based on the number of years they had worked at the Farrel plant. Their average length of service with the defendants was about twenty years so on the average a credit equal to at least twenty weeks of pay was permanently forfeited.

2. The 1981 Severance Plan — Deliberately Unwritten in Order to Avoid ERISA Disclosure.

The plaintiffs seek payment under a *de facto* severance plan which was mostly unwritten. The only written part of the plan was a top level Emhart directive dated December 17, 1981 and marked "confidential". It read:

> "Please be advised that *all* severance pay policies currently in effect at all U.S. operating units are to be cancelled and eliminated from policy manuals as of December 31, 1981.
>
> As the need arises for severance pay considerations in the future, each respective unit manager should inform group management. Group management should contact the Corporate Vice President Human Resources for final authorization of any severance payments."

The December 17, 1981 directive originated at a meeting with top Emhart executives including its Chairman of the Board and its President. The handwritten notes by the author of the directive indicated the decision was:

> "Terminate all existing plans. Establish guideline - not ERISA plan."

One of the defendants' executives and its pension counsel both testified that, on the advice of corporate counsel, the "deciding factor" and reason for eliminating all written severance plans was to avoid the reporting and employee disclosure requirement of ERISA.

After the December 17, 1981 directive, severance policy at Farrel remained substantially unchanged. The former Farrel plant manager testified that severance payments continued to be "automatic". Irish, Farrel's personnel director, simply cleared proposed involuntary terminations and associated severance payments with Cowles, the Emhart corporate plan administrator.

It was done by telephone and no notes or records of any kind were maintained.

The December 17, 1981 directive put an end to Cowle's efforts to get Emhart's many different severance practices consolidated in a single written plan. He testified: "then I got stuck with that other thing [the Dec. 17 directive] so everybody had to call me"; "if there was severance pay involved, I was told about it". Cowles always approved Irish's severance recommendations for Farrel employees.

Each and every one of the twenty-four salaried Farrel employee "terminated" (not "laid off" with rights of recall) involuntarily and not for cause between 1981 and 1986 received at least one week's pay for each year of service (more for managers and supervisors) and they received it regardless of whether termination was followed by a period of unemployment or by immediate reemployment.

The unwritten 1981 plan was "silent" on whether it excluded benefits for employees going to work for the purchaser in a sale of assets divesture situation. The defendants had never told their employees about any such exclusion. No such sale of assets divestiture had ever occurred in the Farrel division prior to the 1986 sales in question.

In 1968 Farrel was acquired by USM and in 1976 USM was acquired by Emhart as a wholly owned subsidiary. Both of these transactions were accomplished by purchasers of the sellers' stock, not its assets. Severance pay was not involved because there had been no change in the legal identity of the employer and it was still liable for the past service credits earned by the employees' years of service prior to the acquisition — credits which would count towards the value of severance pay and other ERISA benefits if or when they became payable in the future.

3. Severance Practices in Other Emhart Subsidiaries

Historically there may have been sales of assets divestitures by other Emhart divisions or subsidiaries, but it is undisputed that the Farrel division employees had no knowledge about them or their associated severance plans. They relied solely on severance practices in the Farrel plant.* The defendants admitted in Court discovery papers that severance practices in other parts of its empire were "irrelevant" to this case.

4. The 1986 Sales

The contracts for the 1986 sale of assets were signed in January 1986 and the closings weren't until May 2 and May 12. They were sales "as a going concern" and needed the plaintiffs to keep working at least until the closing. The plaintiffs were never told about their options. Cowles the defendants' plan administrator testified:

> "None of the employees had that option of saying I will accept or not accept. They were told that their job was to continue under SHW. That's the way you do these things. You don't go to each one and say do you want to accept the jobs . . ."

The defendants admitted that until May 2, 1986, the day of the first closing, nothing was said to the plaintiffs or other employees about severance payments "in part to avoid the commotion that would be stirred up amongst the employees."

On May 2, 1986 the plaintiffs asked if they would receive severance and were "surprised" at the negative answer. Irish, the Farrel personnel manager who had been handling all of the prior Farrel severance payments under the unwritten 1981 plan also

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*See the excerpts from the parties' Joint Appendix in the Second Circuit, attached hereto, Appendix F, p. A38.

was "surprised" "based on cases in the past" because "their employment with Emhart and Farrel was terminated." At the time no reason was given for the denial of severance, but ever since then the defendants have claimed that there was no severance plan or policy in existence on May 2, 1986.

5. The SUB Plans

On May 12, 1986, the same day that the machine shop plaintiffs' employment was terminated and nine days after the roll shop plaintiffs' termination on May 2, the defendants' management for the first time approved and adopted formal "Supplemental Unemployment Benefit" plans for the roll shop and machine shop salaried employees.

The plans provided "supplemental unemployment benefits" of one week's pay for each year of service for "covered" employees who 1) were not offered employment by the purchaser, or 2) accepted employment by the purchaser but were permanently laid off by the purchaser during the balance of 1986.

The plans only talked about "supplemental unemployment benefits". They made no reference to "severance pay" or to the already existing unwritten *de facto* severance plan. Nor did they contain any words of revocation, termination amendment or modification of any prior plan or practice.

6. District Court Jurisdiction and Decision

Federal jurisdiction in the district court was based on ERISA, 29 U.S.C. § 1132 and Title 28 U.S.C. § 1331.

The District Court granted the defendants' motion for summary judgment. It assumed the existence of the unwritten *de facto* plan but held that its interpretation was "irrelevant" and would be "superfluous" because rights under it could not be vested or accrued and the defendants were therefore "entitled" to "dis-

card" it by adopting the SUB plans. The court assumed but never expressly stated that the language used in the SUB plans did actually revoke the earlier plan. It expressly did not reach the applicability of "state contract law principles" to the unwritten plan except to state that any breach of contract claim "is pre-empted by ERISA". It did not find that Emhart had discretionary authority to interpret the unwritten plan and therefore, it followed the *de novo* standard of review rather than the arbitrary and capricious standard.

7. The Court of Appeals Decision

The Second Circuit also assumed the existence of the 1981 unwritten plan as a valid ERISA plan.[1]

It affirmed the District Court judgment on the grounds (see opinion at p.A11) that (1) ERISA did not prohibit Emhart from amending the plan in order to deny severance pay to employees offered positions by the purchaser when the "operation" in which they were employed was sold as a going concern, and (2) even if the amendment was invalid, Emhart had discretionary authority to interpret the prior unwritten plan and the denial of benefits was valid under the arbitrary and capricious standard of review.

In its conclusion the Second Circuit specifically refused to look at state common law decisions interpreting severance plans

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[1] The law is clear that unwritten benefit plans can qualify as ERISA plans. *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982). Employers cannot evade ERISA by ignoring its requirement that the plan be written. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985) (severance claim). Cases often involve unwritten severance plans, *e.g.*, *Franklin v. Pitney Bowes, Inc.*, 919 F.2d 45 (6th Cir. 1990); *Adams v. Avondale Industries, Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, ___ S.Ct. ___ (1990); *Flick v. Borg-Warner*, 892 F.2d 285 (3d Cir. 1989); *Bennett v. Gill & Duffus Chemicals, Inc.*, 699 F. Supp. 454 (S.D.N.Y. 1988); *Petrella v. N.L. Industries*, 529 F. Supp. 1357 (N.J. 1982).

in a divestiture situation. It stated that such contract principles are preempted by ERISA and may not be "viewed as a sort of federal common law that ERISA does not preempt." It denied that *Firestone v. Bruch* required "any narrowing of [the scope of] ERISA's preemptive effect" such as the plaintiffs were supposedly advocating.

It did not discuss the plaintiffs' claim that Emhart should not be allowed to benefit from its knowing and intentional disregard of ERISA's procedural requirements that the plan be in writing and disclosed to employees.

It did not discuss whether Emhart had a conflict of interest.

ARGUMENT
REASONS FOR ALLOWING THE WRIT

1. The Questions Raised Apply to All ERISA Benefit Claims.

In this case, as in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the particular employee benefit involved happens to be severance pay. However, again as in *Firestone*, the contract questions which it raises have a broad application to all the different varieties of employee benefits which the Employee Retirement Income Act of 1974 ("ERISA") was intended to protect.

Contrary to *Firestone* with its welcome return to the common law applicable to employee benefits, this case is typical of many where the federal courts are using ERISA to defeat employees' interests in benefit plans instead of using it to protect those interests. Before the enactment of ERISA, employees like the plaintiffs here almost always won court disputes over severance where their plant was sold as a going concern and they were immediately employed by the purchaser (the "divestiture situation"). Since ERISA, they almost always lose.

Severance pay itself is an important employee benefit. In 1988 forty-two percent of the 31 million employees working for America's large and medium sized employers were covered by such plans. Bureau of Labor Statistics, Bulletin 2336 at iii, 119 (1989). Disputes, particularly in the divestiture situation, frequently involve large numbers of employees and large sums of money. (Approximately $4 million is involved in the present case.) Severance litigation has proliferated in the two years since the Firestone decision without any change in the employees' poor batting average.

2. There Is Conflict and Confusion Amongst the Federal Circuits.

The present situation is summed up as followed in Daniels, *Creating, Administrating, and Terminating Severance Plans in an Era of Economic Dislocation*, 6 The Labor Lawyer, Fall, 1990, 905, 940:

> . . . the uniformity that is one supposed advantage of a unified federal system of pension regulation under ERISA and that justifies, in part, the preemption of state law, has not been achieved. As the cases discussed above demonstrate, courts have drawn fundamentally different conclusions about the very nature of the rights granted under ERISA with regard to the purpose of severance benefits and the amendment and termination of severance plans. Although a majority position can be discerned in several issues, a dissenting strain is present that often reaches diametrically different results under nearly identical facts. While a draconian uniformity is not desirable, the apparent arbitrariness among the courts can be equally harmful.

3. Contrary to *Firestone* and ERISA the Federal Courts are not Developing a Body of Federal Common Law.

As *Firestone* made clear, all ERISA benefit plans are basically contracts between employee and employer and "the validity of a claim . . . is likely to turn on the interpretation of terms in the plan at issue." 109 S.Ct. at 956. Other than its fiduciary and nondiscrimination provisions, ERISA contains no substantive law applicable to the interpretation of "welfare" benefit plans (29 U.S.C. § 1001(1)) such as severance pay, early retirement and health and disability. ERISA contains little more for the interpretation of "pension" benefit plans (29 U.S.C. § 1001(2)) other than its mandatory funding and vesting provisions.

Firestone reiterated the 1974 remarks of Senator Javits that " 'a body of federal substantive law will be developed by the courts . . .' " to provide the missing substantive contract law. 109 S.Ct. at 954. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501 (9th Cir. 1985) (federal common law to be fashioned by "borrowing from state law where appropriate, and guided by the policies expressed in ERISA . . .").

Now, seventeen years since the enactment of ERISA, the federal courts have made negligible progress in fashioning the needed body of contract law. Until this Court's decision in *Firestone*, they had gone down a blind alley limited to the arbitrary and capricious standard of review where thorough contract analysis was unnecessary. Those years produced misleading precedents including a habit of deciding cases on summary judgment despite disputed factual issues which (as in this case) might make summary judgment inappropriate under *de novo* review.

Now, two years since *Firestone*, many of the federal courts are still wandering in confused circles with respect to the source and content of the applicable contract law. The searching contract analysis and increased protection for employees' interests which should have blossomed after *Firestone* has failed to happen. Relying on the tainted pre-*Firestone* decisions, the circuit courts in some cases, including this one, have tended to corrupt the new *de novo* standard of review by using the superficial level of contract analysis which was only appropriate for review under the arbitrary and capricious standard and in other cases, including this one, they have avoided the *de novo* standard altogether by finding discretionary authority in the plan administrator under circumstances which do not meet the discretionary criteria established by *Firestone*.

4. Contrary to *Firestone*, Benefit Claimants Are Worse Off Now Than They Were Under The Common Law Before ERISA Was Enacted.

As a result of the federal circuits' failure to fashion a body of federal substantive law for the adjudication of ERISA claims, severance claimants are worse off now than they were before ERISA was enacted. Under ERISA such claimants have been losing about 80 percent of the time whereas under the common law in the state courts before ERISA they almost invariably won.[2] Note, *Severance Pay, Sales of Assets and the Resolution of Omitted Cases*, 82 Col. L.R. 593, 595 at n.11, 598 (1982). They "would have enjoyed a better chance of obtaining severance benefits without ERISA", *Daniels, supra*, 6 The Labor Lawyer at 940.

This result is clearly contrary to *Firestone* which teaches that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans' and that it should not applied in a manner which . . . would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." 109 S.Ct. at 955-956.

The state common law decisions uniformly hold that benefits based on years of service, such as pensions and severance pay, are deferred compensation, a reward for continued service and loyalty, the right to which is earned with each day of service and cannot be taken away retroactively. Specifically with reference to severance pay, these cases uniformly hold that it is not unemployment compensation and is due in the sale of assets divestiture situation regardless of immediate re-employment at

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[2] Ironically Emhart's employees won the last time they sued in a Connecticut curt for severance pay in a going concern divestiture situation. *Willets v. Emhart Mfg. Co.*, 152 Conn. 487, 208 A.2d 546 (1965).

the same job. *See, e.g., Bolling v. Clevepak Corp.*, 484 N.E.2d 1367 (Ohio App. 1984) and cases listed in Appendix F. (A36).

All these common law decisions hold that the event triggering severance is the termination of the employment relation with the old employer regardless of whether there has been a severance from the "job" (workplace and working conditions). Obviously a severance payment or any other deferred compensation so triggered can never be a "windfall". Judge Higginbotham speaking for the Third Circuit in *Ulmer v. Harsco Company*, 884 F.2d 98 (3d Cir. 1989) reversed the district court on this specific ground, namely, that the triggering event was the termination of the old employment with Harsco even though there had been no severance of the "work place".

In the present case, the plaintiffs and Irish, the Farrel personnel manager, understood from past practice that termination of Farrel employment triggered severance pay, they knew they were being officially "terminated" and were "surprised" that their severance pay was denied.

Judge Higginbotham in *Ulmer* did not specifically cite any common law contract cases, but he relied on a rule of construction often used by those cases, *expressio unius est exclusio alterius*. If this maxim were applied to the present case, then the unwritten plan's "silence" (under the Farrel employee's understanding of the actual practice) about benefits for employees going to work for the purchaser in a sale of assets situation could not be construed an implied exclusion of such employees because under actual practice the unwritten plan already contained some "express" exclusions, i.e., it excluded employees who voluntarily resigned or who were terminated for cause.

A majority of the circuit courts have also failed to use any of the other time-honors rules of contract construction reiterated in the state court decisions. Those rules provide that a benefit plan

is to be "construed liberally in favor of the employee", that it "should not be construed to permit the employer unilaterally to make illusory his promise to pay benefits"[3] and that any ambiguities should be construed against the drafter of the plan.[4]

5. Despite *Firestone*'s Example, Only a Very Few Courts Have Relied On State Common Law Contract Decisions As a Guide and There is a Conflict Between the Circuits.

Firestone itself, 109 S.Ct. at 956, cites with approval three classic state court common law decisions: *Sigman v. Rudolph Wurlitzer Co.*, 11 N.E.2d 878 (Ohio 1937); *Atlantic Steel Co. v. Kitchens*, 187 S.E.2d 874 (Ga. 1972); and *Connor v. Phoenix Steel Corp.*, 249 A.2d 866, 868 (Del. 1969). Those cases happen to involve retirement pensions but the common law makes no distinction between pensions and benefits such as severance pay. For both types of benefits the final payoff comes after the employee's services have been rendered and the size of the benefit is determined by his number of years of service. Both the pension and severance decisions characterize the benefits as deferred compensation rather than "a mere gratuity". *Compare: Atlantic Steel Co. v. Kitchens, supra* (pension is not "a gratuity") with *Dulaney Foods v. Ayers*, 260 S.E.2d 196 (Va. 1979) (severance pay is not "a mere gratuity").

However, since *Firestone*, only a handful of ERISA cases cite and rely upon any state court common law decisions. One of these cases is *Deming v. American Standard*, 905 F.2d 1124, 1128, 1129 (7th Cir. 1990) (early retirement "functioned as a

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[3] *Conner v. Phoenix Steel Corp.*, 249 A.2d 866, 868 (Del. 1969) cited with approval in *Firestone, supra*, 109 S.Ct. at 956.

[4] The defendants in the present case were the "drafters" of the unwritten plan adopted in accordance with their written confidential directive dated December 17, 1981.

reward for past employment")[5] which cites *Kullins v. Malco, A Microdot Co., Inc.*, 459 N.E.2d 1038, 1045 (Ill. 1984) for the proposition that a last minute withdrawal of benefits would violate the implied covenant of good faith.

State court decisions were also cited in *Adkins v. Reliance Standard Life Ins. co.*, 917 F.2d 794 (4th Cir. 1990) (meaning of "independently of all other causes" in an accident insurance policy); and *Fox Valley & Vicinity Const. Workers v. Brown*, 897 F.2d 275, 281 (7th Cir. 1990) (effectiveness of insurance beneficiary's waiver of rights incident to a divorce judgment).

The most significant common law decision is by the Ninth Circuit in *Kunin v. Benefit Trust Life Ins. Co.*,, 910 F.2d 534, 541 (9th Cir. 1990). It applies the common law rule which says that contracts should be construed against the drafter. It is applied in the context of a life insurance policy, but the court's broad language makes clear that its decision is not limited to such contracts or based on the statutory exemption of state life insurance law from ERISA preemption, 29 U.S.C. § 1144(b)(2)(A). The court carefully explains *Firestone*'s reference to construing "terms in trust agreements without deferring to either party's interpretation", 109 S.Ct. at 955, and notes *Firestone*'s indication that ERISA disputes are to be "governed by principles of contract law", *id.* The court concludes, "It is, then, quite plain that the *Firestone* Court intended no wholesale rejection of prevailing principles of plan interpretation . . ."

On this point there is a clear split between the circuits. The Eighth Circuit in *Brewer v. Lincoln Nat. Life Ins. Co.*, 921 F.2d 150, 154 at n.2 (8th Cir. 1990), has expressly declined to follow

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[5] In this case the Seventh Circuit held that a list minute change in plan options violated ERISA's non-discrimination provision, 29 U.S.C. § 1140. The plaintiffs made the same claim in the present case but it was not discussed by the Second Circuit.

Kunin on the grounds of both preemption and its reading of *Firestone*. Other circuits, including the Second Circuit in the present case, avoid the common law's "prevailing principles of plan interpretation" by simply invoking a blanket rule of preemption.

6. Contrary to *Firestone* Some Circuits Fail to Treat ERISA Claims as Breach of Contract Claims.

Since *Firestone* a few circuits have recognized that these are basically breach of contract cases, *e.g., Lowry v. Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 524 (5th Cir. 1989) ("*Bruch* instructs us that Congress did not intend to constrict the common law rights of employees"). The Third Circuit decision in *Ulmer v. Harsco Corp., supra,* is an outstanding example of careful contract analysis. The Eighth Circuit in *Wallace v. Firestone Tire & Rubber Co.*, 882 F.2d 1327, 1330 (8th Cir. 1989) didn't go quite so far but recognized *Firestone*'s emphasis on "straight contract interpretation" and concluded that after *Firestone* "there is a possibility that our analysis of this type of ERISA case may need an overhaul".

On the other hand, the Sixth Circuit in *Adams v. Avondale Industries, Inc.*, 905 F.2d 943 (6th Cir. 1990), *cert. denied*, ___ U.S. ___ (1990), used what might be called an "ERISA analysis" and totally failed to use or mention a common law contact analysis. Worse still, the Second Circuit and the district court in the present case both expressly rejected a common law contract analysis as being "preempted" by ERISA (A14 and A26). The Second Circuit actually divided its opinion into two mains parts; "A. The ERISA Claims" (A8), and "B. The Common Law Claims" (A12) instead of recognizing that they were substantially one and the same thing.

7. The Circuits Are Evading *Firestone*'s Teaching By Stretching ERISA's Preemption Too Far.

Most of the decisions which fail to rely on or even mention state common law employment contract cases do not give any reasons for ignoring those cases. Presumably it results from uncertainty in the minds of judges and litigants alike about the scope of preemption. In this case both the district court and the Second Circuit explicitly held that those state court decisions and breach of contract claims are preempted, but they did not explain or even discuss what "preemption" means and doesn't mean under ERISA.

Neither court recognized that despite its length and apparent complexity, the ERISA statute contains very little substantive law (except for funding and vesting of "pension" benefits which are not involved here), and that therefore guidance for the interpretation and construction of benefit plans must be found in the common law.

Neither court recognized that, as a practical matter, preemption only means that what used to be a common law breach of contract claim now must be brought in the federal court and decided by a uniform national common law of contracts (consistent with ERISA's objectives and provisions) instead of being decided just by the common law of the state where the suit was pending.

The Second Circuit held that *Firestone* did not "effect any narrowing of [the scope of] ERISA's preemption effect," apparently not realizing that it was the Second Circuit itself that was *broadening* the scope of preemption far beyond the contemplation of this Court or Congress. The legislative history of ERISA's preemption provisions, 29 U.S.C. § 1144(a), clearly shows that its purpose was to achieve national uniformity and to avoid "State action that might impinge on federal regulation." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 99 n.20, 103 S.Ct.

2890, 2901 n.20 (1983). These objectives are not violated in any way by simply using common law state court decisions as a guide in developing a uniform body of federal common law. *Holliday v. Xerox Corp.*, 555 F. Supp. 51, 55 (E.D. Mich. 1982), *aff'd* 732 F.2d 548 (6th Cir. 1983), *cert. denied*, 469 U.S. 917, 105 S.Ct. 294, 83 L.Ed.2d 229 (1984) (an ERISA decision holding that, "there is no substantial body of federal common law of contract. Thus, state law will be looked to as a guide"). State court contract decisions are routinely used in this manner in connection with other federal labor legislation. *See, e.g., UAW v. Yard-Man Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), one of the progeny of *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912 (1957).

8. The Circuits Disagree About The Continued Validity of Pre-*Firestone* Decisions Made Under The Arbitrary And Capricious Standard of Review.

Daniels, supra, 6 The Labor Lawyer at 940 comments that ERISA cases denying benefits show "little change" since *Firestone* brought in *de novo* review because "much of the analysis that took place under the arbitrary and capricious standard is grafted into *de novo* review."

In the present case, the Second Circuit and the district court relied heavily on the old arbitrary and capricious cases particularly with respect to the employer's right to unilaterally amend a plan any time. so did the Sixth Circuit in *Adams v. Avondale Industries, Inc., supra*, although it did caution against "applying rules developed specifically to ferret out arbitrary and capricious action when interpreting the terms of a plan *de novo*" 905. F.2d at 950.

On the other hand the Third Circuit has found that those pre-*Firestone* federal decisions are no longer "persuasive authority", *Ulmer v. Harsco, supra*, 884 F.2d at 104; and the Eighth Circuit

found that the district court's factual conclusions were "interwoven" with the arbitrary and capricious type of review and might be different if found *de novo*, and therefore refused to decide the case on the merits at the appellate level. *Wallace v. Firestone Tire & Rubber Co., supra,* 882 F.2d at 1330.

In *Wallace* the Eighth Circuit also recognized that labeling the payment of severance in the divesture situation a "windfall", (as was done in many of the pre-*Firestone* arbitrary and capricious cases), was no longer appropriate under *Firestone*'s approval of a contract analysis for ERISA plans. On the other hand, the Second Circuit a year and one half later still approves the outmoded 'windfall" analysis (A10). In a more recent decision than *Wallace*, the Eighth Circuit itself cited nothing but arbitrary and capricious cases while purporting to make a *de novo* determination that severance pay was not due. *Harper v. R. H. Macy & Co., Inc.,* 920 F.2d 544 (8th Cir. 1990).

9. Some Courts Are Evading *Firestone* and *De Novo* Review By Embellishing The Plan Administrator's Actual Authority and There Is A Conflict Between The Circuits.

In order to avoid *de novo* review under *Firestone* the plan must provide that the administrator "has the power to construe uncertain terms or that [his[eligibility determinations are to be given deference", 109 S.Ct. at 954. The administrator had no such power under the plan in the present case. The only thing in writing was the "confidential" December 17, 1981 directive and it merely said that the administrator should be "contact[ed] . . . for final authorization of any severance payments." Language merely granting "final authority" does not connote the required amount of discretion because it only describes the mandatory role of all trustees to approve or reject claims. *Baxter v. Lynn,* 886 F.2d 192 (8th Cir. 1989), and *Ziaee v. Vest,* 916 F.2d 1204, 1207 (7th Cir. 1990) (citing four other similar 1990 and 1989 Seventh Circuit decisions).

The district court in this case did not find sufficient discretionary authority to justify use of the arbitrary and capricious standard of review and therefore reached its decision on a *de novo* basis. The Second Circuit apparently had some concern that the decision might not be supportable under a *de novo* review and therefore seems to have grabbed at straws in order to justify a less searching review under the arbitrary and capricious standard. Ignoring evidence that the award of severance pay was "automatic", the Second Circuit relied solely on what the administrator self-servingly said that he did. In so doing, it was also ignoring *Firestone*'s requirement, 109 S.Ct. 954, recognized in *Wallace v. Firestone, supra*, 882 F.2d at 1329, that the extent of the administrator's authority must be found in the written plan itself ("the instrument under which they act") and not in what the administrator may have done or not done.

Since *Firestone* other courts have upheld a denial of benefits by similarly embellishing the administrator's authority to the point where the review could be merely at the arbitrary and capricious level, *e.g., Lakey v. Remington Arms Co.*, 874 F.2d 541 (8th Cir. 1989) (with a dissent pointing out the absence of any real evidence of discretionary authority).

There are no "magic words" which describe the required discretionary authority. There is a split between the circuits "concerning whether similar generic language" does or does not grant sufficient authority. *Pratt v. Petroleum Production Maint., Inc.*, 920 F.2d 651, 658 (10th Cir. 1990) (citing very recent decisions from the First, Fourth, Fifth and Eleventh Circuits which found discretion in the same "generic language" that had been found to be non-discretionary in equally recent cases cited from the Eighth and Ninth Circuits).

It is respectfully submitted that this Court should do something to plug up *Firestone*'s discretionary authority loophole. In the case of an unfunded plan such as severance where the payoff

comes at the end of many years of service by the employee and where large sums can be involved if, as here, there are mass terminations all at one time, the existence of any theoretically impartial discretion is totally wiped out by the conflict of interest inherent in deciding whether to take $4 million out of the employees' pocket and put in into the employer's pocket. Perhaps there should be further consideration of the concern for impartiality expressed by the Third Circuit in its pre-*Firestone* opinion in *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d at 143-146.

At the very least this Court should insist on strict adherence to the *Firestone* guidelines, 109 S. Ct. at 956, including the requirement that the administrator's conflict of interest "must be weighed as a 'factor[] in determining whether there is an abuse of discretion'." Both the Second Circuit in this case and the Eighth Circuit in *Lakey, supra*, totally ignored this requirement. It was not even mentioned.

The Eleventh Circuit has taken a step in the right direction by imposing on the employer the burden of proof on this conflict of interest issue. *Brown v. Blue Cross & Blue Shield of Alabama*, 898 F.2d 1568 (11th Cir. 1990).

10. The Failure of the Circuits to Consider the Common Law of Contracts Has Resulted in Their Erroneous Findings of an Unilateral Unfettered Right to Amend ERISA Plans Retroactively.

The Second Circuit in this case and the Sixth Circuit in *Adams v. Avondale, supra*, are the strongest of many Federal Court decisions saying, or seeming to say, that there is a totally unfettered right to unilaterally amend ERISA "welfare" benefit plans such as severance pay. They could not have reached those decisions if, as discussed earlier in this petition, those courts had paid attention to the vast body of state common law contract

cases on employee benefit plan. See the cases listed in Appendix F. (A36). From cases such as *Kulins v. Malco, supra*, they would have found that plans promising future benefits based on the number of years of service cannot be amended retroactively after the service has been performed.

11. There is No Conflict Between ERISA and the Common Law of Contracts on the Right to Amend.

All the federal cases except the Second Circuit in this case, only say that the *fiduciary* provisions of ERISA *do not prohibit* last minute amendments of "welfare" benefit plans. In effect they only say that any limitations on amendment must be found outside of ERISA. *See, e.g., Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) (such limitations may be found in the "pertinent employment agreements").

Nevertheless, the Second Circuit, expressly (A10), and several other Federal Courts by implication, have created a virtual statutory prohibition against the vesting of "welfare" benefits based on Congress' omission of statutory vesting requirements for "welfare" benefits such as those that it did provide for "pension" benefits. Such sleight of hand violates the canons of statutory construction. *See, In re White Farm Equipment Co.*, 788 F.2d 1186, 1191-92 (6th Cir. 1986) ("no leap of logic transforms Congress' exclusion of welfare benefit plan from various ERISA requirements into an express endorsement of unfettered unilateral termination of such plans").

An unfettered right of unilateral amendment would itself violate the amelioratory purposes of ERISA. Contrary to *Firestone*, employees would be worse off than they were under the common law before ERISA was enacted.

Indeed, ERISA, itself, 29 U.S.C. § 1102(b), requires that all plans, including "welfare" benefit plans, provide a procedure for

amending such plan and for identifying the persons who have authority to amend the plan." The Third and Sixth Circuits have been struggling with the question of whether this provision makes statutory the common law requirement that a contract cannot be amended unilaterally unless the power to do so has been expressly reserved. *See Hozier v. Midwest Fasteners, Inc.*, 902 F.2d 1155, 1163 n.9 (3d Cir. 1990); *Flick v. Borg-Warner, supra*, at 290-91 and n.9 (dissent); and *Adams v. Avondale Industries, Inc., supra*, 905 F.2d at 948-949. In the present case there was no such reservation of a power to amend the unwritten plan.

12. An Unfettered Right to Amend "Welfare" Benefits Retroactively Makes ERISA Worse Than a Nullity.

Of what use is an employee "welfare" benefit if it can be amended out of existence just before payment becomes due (or even after that point as in the present case)?

Such a result is totally contrary to the common law of benefit contracts including the three pre-ERISA cases cited with approval in *Firestone*, 109 S.Ct. at 956, *e.g., Atlantic Steel v. Kitchens, supra*, 187 S.E.2d at 827 (a promised benefit "is not a gratuity which the employer can withhold at will").

13. ERISA Becomes A Nullity If Employers Can Continue To Benefit From Their Own Deliberate Violations Of Its Procedural Requirements.

Except for its fiduciary and non-discrimination provisions, 29 U.S.C. §§ 1101-1114 and 1140, ERISA's only impact on "welfare" benefits is to establish numerous procedural requirements. The following important requirements were violated by Emhart in this case:

A. The plan and a "summary plan description" must be in writing and fully disclosed to all participants. 29 U.S.C. §§ 1021(a), 1022, 1024(b), 1102(a).

B. The "summary plan description" and any "material modifications" or amendments of it must be "reasonably comprehensive" and in unambiguous language capable of being "understood by the average plan participant" (*Id.*, § 1022 and 29 C.F.R. § 2502.102-2).

C. The Plan must contain a procedure for its amendment and identify the persons with amending authority (29 U.S.C. § 1102(b)(3)).

D. Any denial of claims must be in writing, contain the "specific reasons" for denial and be subject to a full and fair review by the employer (29 U.S.C. § 1133).

The purpose of these procedural requirements was in part to "enable employees to police their plans". *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1354 (9th Cir. 1985) (quoting from the legislative history) *cert. denied*, 477 U.S. 805 (1985). *Blau* is the leading case to hold that a wholesale "flouting" of ERISA's procedural requirements can "rise to the level" of "a substantive harm". In *Blau*, as in the present case, the employer did not comply with any of the procedural requirements (the plan was in writing but it was "confidential" and not disclosed to the employees).

The *Blau* doctrine has been universally accepted by the federal courts, *see e.g. Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 328 (2d Cir. 1985), but it has been almost as universally found not to apply to the facts of the specific case in question.[6] The Court usually finds that the procedural violations in the case before it do not rise high enough to overcome the rule (discussed in *Blau, supra*, at 1353) that, absent bad faith, a claimant is not

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[6] However, a few courts have actually followed *Blau*. *See, e.g., Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir. 1987) and *Bennett v. Gill & Duffus Chemicals, Inc., supra).*

entitled to a substantive remedy for such procedural violations, *e.g., Franklin v. Pitney Bowes, Inc., supra*, 919 F.2d at 48 (failure to put plan in writing was not "the product of bad faith").

Many courts just do as the Second Circuit did in this case. They simply ignore the procedural violations.

The procedural violations in this case were duplicated in *Adams v. Avondale, supra* and the Sixth Circuit likewise totally ignored both the employer's failure to put the original plan in writing and its failure in the so-called "amendment" to use any amendatory language capable of being so "understood by the average plan participant", (29 U.S.C. § 1022). The Sixth Circuit dismissed the employer's procedural (and substantive) failure to reserve a right to amend with the convenient panacea that the employees had not shown any "detrimental reliance" on the omission. In view of ERISA's liberal purpose, such reliance should be presumed.

Judge Becker in his learned dissent in *Flick v. Borg-Warner, supra*, 892 F.2d at 293-294, discussed possible methods for applying the *Blau* doctrine to *de novo* review. He recommended that it should result in shifting the burden of proof to the employer and thereby reduce the appropriateness of summary judgment in his favor.

The procedural violations in *Blau, Flick, Adams* and in the present case were serious enough so that the employer should be estopped from taking advantage of any ambiguities or omissions which could have been cured if he had complied with ERISA'S procedural requirements.

Prejudice to the employees should be presumed from ERISA's liberal statutory purposes, however there is no doubt about the prejudice to the plaintiffs here. Until the day of their termination in 1986, the plaintiffs never knew, as they were entitled to know in 1981 under ERISA's disclosure requirements, that the defen-

dants would claim that divestiture was an exception to severance eligibility. They were thus deprived of the opportunity between 1981 and 1986 of quitting because of their dissatisfaction with that exception or of negotiating with the defendants to eliminate it. Their group bargaining power would have been especially strong during the five months in 1986 between the time the defendants announced the sales on a going concern basis and the time of the closings. If the sale was going to go on through, the defendants urgently needed the plaintiffs to stay on through the closing rather than have them quit sooner to look for more promising employment elsewhere.

If employers are allowed to maintain unwritten "welfare" benefit policies in violation of ERISA, they have just as good a tool for defrauding employees as they would have if they had an unfettered right to amend. When the occasion for paying such a benefit arrives, the employer will be "able to interpret the [benefit] policy through the cost-benefit analysis of hindsight". *Blau, supra*, at 1355.

Blau found that the employer was motivated by what amounted to bad faith when it "flouted" ERISA's requirements by keeping its written plan secret. Here Emhart also kept its December 17, 1981 directive confidential. But much worse, it kept the plan itself unwritten and it expressly admitted doing so for the specific purpose of evading ERISA.

What protection will employees get from ERISA's procedural requirements if this court permits the lower courts to continue ignoring such flagrant violations?

CONCLUSION

Factually, this case is a nearly perfect vehicle for the resolution by this Court of the important ERISA questions which it raises. This is true depsite the fall back position taken by the Second Circuit in an apparent effort to cover all the bases. That fall back position is that even if the unwritten plan could not be amended retroactively, "there was no indication" that under Emhart's prior practice, severance would have been paid to employees in the plaintiffs' situation (A8). However, this is not a finding of fact. It is a finding of law interpreting and construing the unwritten contract. It is not a finding which could survive (on summary judgment) the application of either of the common law rules of construction advocated on pages 14-15 above: (1) the contract is to be construed against the drafter and (2) *expressio unius est exclusio alterius.*

Likewise, contrary to the Second Circuit's other fall back position (A12), past practice in Emhart divisions and subsidiaries other than the Farrel plant have no bearing on the interpretation of the unwritten severance plan at Farrel. The Defendants judicially admitted that the Plaintiffs had no knowledge of such practices and did not rely upon them. (See Appendix F, p. A38)

This petition for certiorari should be granted.

Respectfully submitted,

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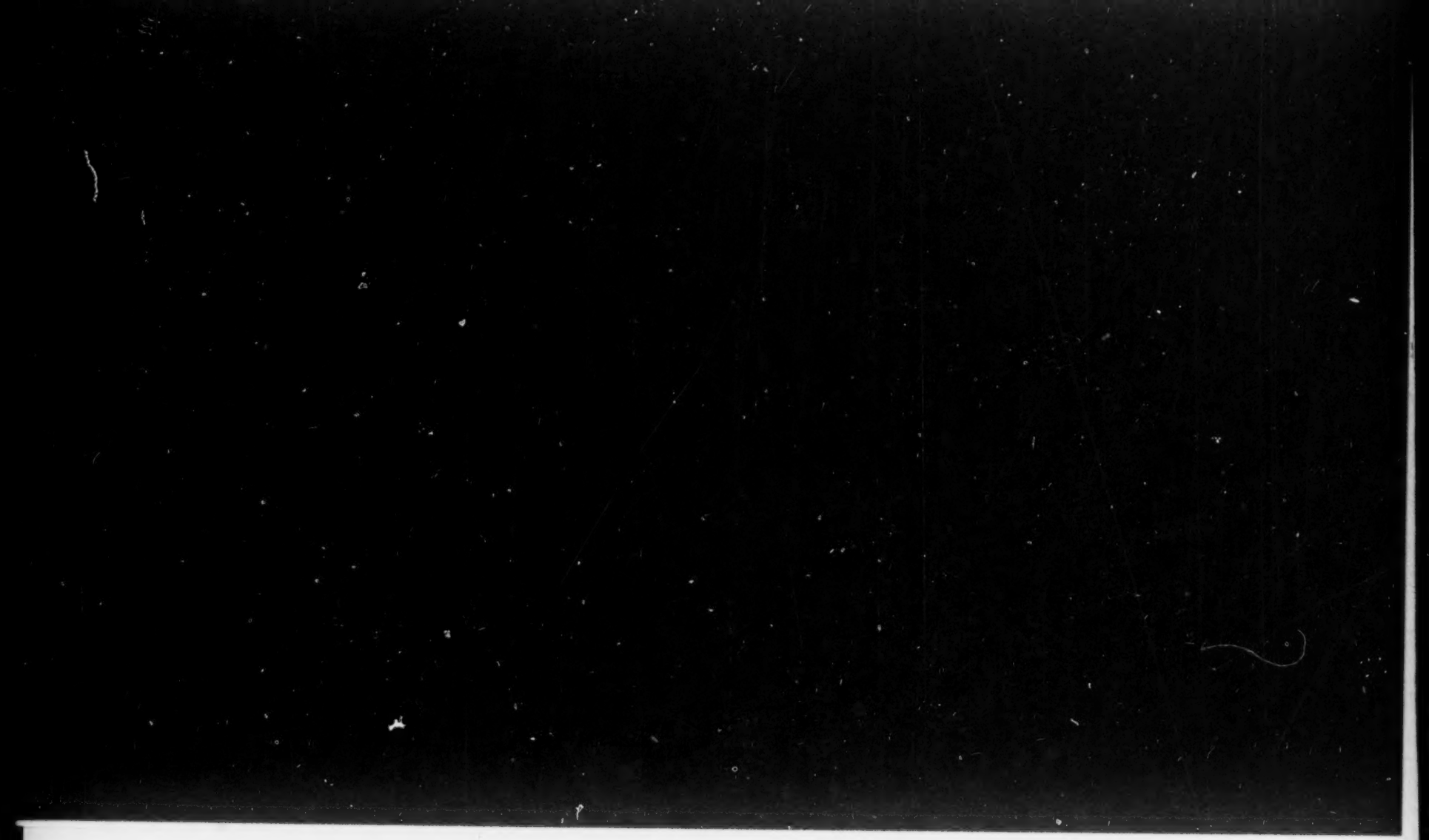
APPENDIX



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 326-August Term, 1990
(Argued: October 3, 1990
Decided: December 11, 1990)
Docket No. 90-7400

ROBERT REICHELT, CATHERINE PELLETIER, PAUL S. JUZWISHEN, ALLEN A. MICHEWICH, FRANK A. MISIEWICZ, WILLIAM J. MUELLER, JOSEPH M. SCAVONE, LINDA A. SHINGARA, JOHN D. SWEENEY, HENRY W. WAJDOWICZ, and All Class members,

Plaintiffs-Appellants,

-v.-

EMHART CORPORATION, USM CORP., AND ROYAL E. COWLES,

Defendants-Appellees.

Before:

FEINBERG, VAN GRAAFEILAND,and KEARSE,
Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, Alan H. Nevas, *Judge*, summarily dismissing action for severance benefits under ERISA, 29 U.S.C. § 1001 et seq.

Affirmed.

DAVID S. MACLAY, Bridgeport, Connecticut (Marsh, Day & Calhoun, Bridgeport, Connecticut, on the brief), *for Plaintiffs-Appellants*.

MARK S. DICHTER, Philadelphia, Pennsylvania, (Sarah A. Kelley, Morgan, Lewis & Bockius, Philadelphia, Pennsylvania, William J. Bruner, III, The Black & Decker Corporation, Towson, Maryland, on the brief), *for Defendants-Appellees*.

KEARSE, Circuit Judge:

Plaintiffs Robert Reichelt et al. appeal from a judgment of the United States District Court for the District of Connecticut, Alan H. Nevas, Judge, dismissing their complaint seeking severance benefits from their former employer, defendant Emhart Corp. ("Emhart"), *et al.*, under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. (1988), and under common-law contract principles, in connection with Emhart's sale of the division in which plaintiffs were employed. The district court granted summary judgment dismissing the complaint on the grounds that (1) an employer's refusal to pay severance benefits in connection with the sale of part of the company does not violate ERISA, and (2) ERISA preempted plaintiffs' breach-of-contract claims. On appeal, plaintiffs contended that they were entitled to partial summary judgment in their favor under either ERISA or common-law contract principles. For the reasons below, we reject their contentions and affirm the judgment of the district court.

I. BACKGROUND

The pertinent facts are not in dispute. Prior to May 1986, plaintiffs were salaried employees of the Farrel division of defendant USM Corp. ("USM"), which was a wholly-owned subsidiary of Emhart (collectively the "Company"). Plaintiffs

were employed in the Company's Ansonia, Connecticut plant in either the "roll shop" or the "machine shop." On average, they had been employed in these operations for approximately 20 years. In 1986, Emhart sold the roll shop to SHW Corporation ("SHW") and sold the machine shop to Liebergesell Group ("LG").

A. The 1986 Sales and Denial of Severance Benefits to Plaintiffs.

In April 1986, the Company informed roll shop employees by letter that the sale of that shop to SHW was imminent and that upon the sale their employment with the Company would cease. The letter did not mention severance benefits. The sale of the roll shop took place on Friday May 2, 1986. On that day, SHW made written offers of employment to salaried roll shop employees. On the same day, roll shop employees met with Company executives, who formally reported the sale and informed them that if they were offered employment with SHW they would not receive severance pay from Emhart. Thereafter, as discussed in Part I.B. below, Emhart adopted a plan providing that severance benefits could be paid to an employee who was offered employment with SHW only if he or she accepted the offer and SHW terminated the employment before the end of 1986.

The May 2 SHW offers specified that they were to be accepted by the start of business on Monday, May 5. All of the plaintiff roll shop employees accepted and began work with SHW on May 5. Emhart had these employees sign a "Change of Status" form which described their departure as "Termination due to Roll Shop sale to SHW. Employees to be hired by SHW."

The salaried machine shop employees were treated similarly. On or about May 12, they received letters from Emhart stating that the sale of that shop to LG was imminent and that their employment with Emhart would be terminated. The letters stated that those offered employment with LG would not receive

severance pay; thereafter Emhart adopted a plan that could entitle them to severance benefits if their employment were terminated by LG in 1986. On May 13, all of the plaintiff machine shop employees accepted offers of employment from LG.

Following the sales, plaintiffs' tasks, hours, and salaries with their new employers were the same as they had been with Emhart. Their benefits were slightly different; in particular, the new employers did not give them credit, for severance pay purposes, for their years of employment by the Company. None of the plaintiffs had his or her employment terminated by the purchaser in 1986 and hence none received severance pay from Emhart.

B. The Pre-1986 Severance Pay Practices and the 1986 SUB Plans

Prior to Emhart's sale of these shops, various severance pay practices had been followed. Until 1968, the roll and machine shops were owned by Farrel Corporation ("Farrel"), an independent company. In 1968 Farrel was sold to USM, itself then an independent company; no severance benefits were paid to employees who continued to work for USM. In 1976, the stock of USM was sold to Emhart; no severance benefits were paid to employees who continued to work for the Company.

In 1980, Emhart, which had made many corporate acquisitions, began to consider the adoption of a uniform severance policy for all of its subsidiaries and divisions. It considered adopting a written policy that would have, *inter alia*, specifically excluded from severance pay eligibility those employees who retained their positions when the division in which they were employed was sold as a going concern. In December 1981, the Emhart Corporate Compensation Committee declined to adopt this or any other written severance policy. On one draft severance plan, Emhart's Vice President for Administration, Sherman

Carpenter, wrote, "Terminate all existing plans. Establish guidelines - not ERISA policy." Carpenter issued a formal memorandum dated December 17, 1981, stating that "all severance policies currently in effect at all U.S. operating units are to be cancelled and eliminated from policy manuals as of December 31, 1981." (Emphasis in original.) The memorandum continued:

> As the need arises for severance pay considerations in the future, each respective unit manager should inform group management. Group management should contact the Corporate Vice President Human Resources for final authorization of any severance payments.

No formal plan was adopted, and Emhart did not have a formal written policy at the time of the 1986 sales.

From 1981 to the time of the 1986 sales, it was Emhart's practice to grant some severance pay to employees of the roll and machine shops who were involuntarily terminated for reasons other than cause. The employee's supervisor or the human resources director would recommend severance pay, and the recommendation would be reviewed by defendant Royal E. Cowles, Emhart's Vice President for Human Resources. Between December 17, 1981, and May 1986, Cowles received severance pay recommendations for 29 salaried employees in those Ansonia operations, and in each case he approved a payment. Of those employees, 19 received the equivalent of one week's pay for each year of service; six received more than one week's pay per year of service, and four received less. The record does not indicate that Cowles rejected a recommendation for severance pay for any roll or machine shop employee during this period.

None of the Ansonia employees terminations during the 1981-1986 period resulted from the sale of part of the business as a going concern. During this period Emhart sold many of its other divisions and subsidiaries, however, and its uniform prac-

tice in connection with those sales was to adopt a formal, written ERISA plan to cover persons who would become unemployed as a result of the sale, and not to pay severance pay to employees who continued their employment with the purchaser.

In May, 1986, Emhart adopted "Supplemental Unemployment Benefits" plans ("SUB" plans) for roll and machine shop employees involuntarily terminated in 1986. In addition to providing for severance pay to employees laid off between February 1 and the dates the shops were sold, the SUB plans principally granted severance benefits to salaried employees still employed by Emhart who were not offered positions by SHW and LG. In addition, these plans provided that those who were offered and accepted positions with SHW and LG could receive severance pay if their employment were terminated by the purchaser in 1986. The SUB plans for roll shop and machine shop employees, respectively, stated that

> [a]ny covered Roll Shop employee employed by USM on the date of sale and employed by SHW Incorporated after the date of sale of the Roll Shop, will also be eligible to receive supplemental unemployment benefits if he is permanently laid off by SHW Incorporated during 1986...

and

> [a]ny covered Machine Shop employee employed by USM on the date of sale and employed by [LG] after the date of sale of the Machine Shop will also be eligible to receive supplemental unemployment benefits if he is permanently laid off by [LG] during 1986...

The amount of benefits in each case was to be one week's pay for each full year of continuous service with USM, minus any "notification pay."

C. The Present Action and the Decision Below

Beginning in 1986, several of the plaintiffs commenced actions in state court, which were removed to the district court and consolidated into the present action on behalf of some 220 plaintiffs. Plaintiffs contented that under Emhart's pre-1986 policy, they had accrued rights to severance benefits and that Emhart's failure to pay those benefits upon the sale of the roll and machine shops violated their rights under ERISA and under common-law contract principles. Following a period of discovery, defendants moved for summary judgment dismissing the complaint; plaintiffs crossmoved for partial summary judgment in their favor on the issue of liability.

In a *Ruling on Cross Motions for Summary Judgment* dated February 16, 1990, the district court denied plaintiffs' motion and granted defendants' motion to dismiss. The court found that, assuming Emhart's pre-1986 policy was a *de facto* ERISA plan, Emhart was free to modify, restrict, or terminate it without violating ERISA. Since it was clear that plaintiffs were not entitled to severance benefits under the SUB plans, the court concluded that plaintiffs' ERISA claims were without merit. Further, the court ruled that ERISA preempted plaintiffs' breach-of-contract claims.

Upon plaintiffs' motion for reconsideration, the court adhered to its decision, and judgment was entered dismissing the complaint. This appeal followed.

II. DISCUSSION

On appeal, plaintiffs contended principally (1) that the district court erred in ruling that Emhart was not obligated under ERISA to award them severance pay in accordance with the practice followed prior to the sale of the roll and machine shops, and (2) that under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101

(1989), plaintiffs' claims should be adjudicated in accordance with common-law contract principles. We disagree.

A. The ERISA Claims

In support of their contention that they were entitled to severance benefits under ERISA, plaintiffs argue principally that Emhart's SUB plans were "irrelevant," that ERISA did not permit Emhart to adopt the SUB plans in modification of its prior practice, and that under the prior practice, plaintiffs were entitled to severance pay. Neither the law nor the record supports plaintiffs' position.

Plaintiffs contend that though Emhart had no written severance benefit plan from 1981 to May 1986, its unvarying practice during that period constituted a *de facto* ERISA plan requiring severance pay to any employee who was terminated involuntarily. Even if we accept for purposes of this appeal the proposition that Emhart's pre-1986 practice was an ERISA plan, plaintiffs cannot prevail since (1) ERISA did not prohibit Emhart from amending the plan to deny severance pay to employees offered positions by the purchaser when the operation in which they were employed was sold as a going concern, and (2) even if Emhart's prior practice remained in effect, there was no indication that under that practice severance benefits would be paid to employees whose operation was sold as a going concern and who continued to work for the purchasers.

ERISA governs two types of employee benefit plans: those that provide for "pension" benefits, *see* 29 U.S.C. § 1002(2), and those that provide for "*welfare*" benefits, *see id.* § 1002(1). In recognition of the expense of maintaining and administering employee benefit plans, Congress structured ERISA to impose the most stringent requirements in connection with pension plans and left the employer with considerable flexibility with respect to welfare plans. *See, e.g.*, S. Rep. No. 383, 93d Cong., 2d Sess. 18, reprinted in 1974 U.S. Code Cong. & Admin. News

("USCCAN") 4890, 4904 (Congress sought to "keep[] costs within reasonable limits"); *id* at 51, USCCAN at 4935 (requiring vesting of ancillary benefits "would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income"). Thus, employee pension benefit plans are subject to elaborate accrual, vesting, and funding requirements. 29 U.S.C. §§ 1051-1085. On the other hand, welfare benefit plans, though subject to certain disclosure and fiduciary requirements, *see id.* §§ 1021-1031, 1101-1114, "are exempt from the more stringent ERISA requirements," *Young v. Standard Oil (Indiana)*, 849,F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988), and welfare benefits are thus unaccrued and nonvested.

An unfunded severance plan is an "employee welfare benefit plan" under 1002(1). *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 325 (2nd Cir. 1985), *aff'd mem.*, 477 U.S. 901 (1986); *accord Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1145 (4th Cir. 1985), *aff'd mem.*, 477 U. S. 901 (1986); *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 59 U.S.L.W. 3387 (U.S. Nov. 26, 1990) (No. 90-612); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499), 1503 (9th Cir. 1985); *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 17-18 (1987); *Schwartz v. Newsweek, Inc.* 827 F.2d 879, 881 n.2 (2d Cir. 1987) ("*Fort Halifax* ... adopted [*Gilbert v. Burlington Industries'*] holding...that an employer severance pay plan..., which pays benefits on an ongoing basis to employees severed under certain circumstances, is an 'employee welfare benefit plan' under ERISA.").

Since severance benefits are welfare benefits and an employee's interest in a welfare benefit plan is not vested, the employer has no continuing obligation to provide severance benefits; under ERISA, the employer has the right at any time to amend or terminate a severance pay plan. *See, e.g., Adams v. Avondale Industries, Inc.*, 905 F.2d at 947 (employer may freely amend

ERISA severance pay plan); *Young v. Standard Oil (Indiana)*, 849 F.2d at 1045 (employer is "free to alter or eliminate severance benefits...without consideration of the employees' interests"); *Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983)(ERISA does not prohibit modification of severance plans because Congress believed the vesting of such benefits would be too costly), *cert. denied*, 467 U.S. 1205 (1984); *see also Phillips v. Amaco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. (1986)("ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued"), *cert. denied* 481 U.S. 1016 (1987).

Since an employer has the right under ERISA to amend or eliminate a severance benefit plan at any time, a *fortiori* it may do so in the context of the sale of a part of its business as a going concern. Further, a number of courts have suggested that with respect to employees who continue comparable employment with the purchaser of the business, supplementing their salary checks from the purchaser with severance payments from the prior employer would bestow a "windfall, because it would award severance pay to persons who never changed their jobs and were never out of work." *Sejman v. Warner-Lambert Co.*, 889 F.2d 1346, 1350 (4th Cir. 1989), *cert. denied*, 111 S. Ct. 43 (1990); *accord Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983)("To award severance benefits under these facts would result in a windfall to the employees who retained their positions with the purchaser of the going concern, which was clearly not the intention or goal of ...ERISA"); *Schwartz v. Newsweek, Inc.*, 827 F.2d at 883 (quoting *Syl*); *Lakey v. Remington Arms Co.*, 874 F.2d 541, 545 (8th Cir. 1989)(severance benefits would be "windfall" where "change in employer...caused the employees no lack of work").

Under these principles, Emhart was entitled to adopt its SUB plans, which, inter alia, specified its severance benefit policy with respect to roll and machine shop employees affected by the

sale of the shop in which they were employed. Plaintiffs contended that the SUB plans are "irrelevant," arguing that they were intended to apply only to persons who had already been laid off by Emhart by the time of the shop sales and that "[t]he SUB plans contain no reference whatsoever to people like the plaintiffs who were actively employed on the day of the sale." (Plaintiff's brief on appeal at 13.) This contention is contradicted by the express terms of the SUB plans: the second group of employees listed in the "Eligibility" section of the roll shop SUB plan was salaried roll shop "employees employed by USM on the date of sale and employed by SHW after the date of sale." (Emphasis added.) The machine shop SUB plan was precisely parallel, making salaried machine shop "employees employed by USM on the date of sale and employed by [LG] after the date of sale" (emphasis added) conditionally eligible for severance benefits. The SUB plans provided that such an employee could become entitled to severance pay if the purchaser terminated his or her employment before the end of 1986.

In sum, the Emhart SUB plans in effect in May 1986 denied severance pay to any salaried roll shop or machine shop employee who was offered a position by the purchase of his or her shop, but made those employees conditionally eligible for severance pay if they accepted those positions and were thereafter terminated by the purchaser during 1986. Since none of the plaintiffs was so terminated by SHW or LG, plaintiffs were not entitled to severance benefits.

Finally, we note that even if we concluded that Emhart was not permitted by ERISA to modify its pre 1986 "plan," plaintiffs could not prevail on their claims for severance benefits. Emhart had expressly rescinded its formal plans, and it had adopted the practice of allowing Cowles, its Vice President for Human Resources, to determine severance pay awards when he received recommendations for such payments. The record shows that in evaluating these recommendations, Cowles did not use any

written criteria, standards, or guidelines. Assuming there had been no willful misconduct, Cowles evaluated the reason for the termination, "whether it was poor performance, lack of business, [or] the phase-out of an operation." When the reason was the sale of an operation as a going concern, he never authorized severance pay when a salaried employee was to continue in comparable employment with the purchaser. We disagree with plaintiffs' contention that Cowles's general use of a formula of one week's pay for each year of Company service demonstrated that his severance pay determinations were not discretionary. The use of a virtually uniform formula with respect to amount does not raise a genuine issue as to whether the decision on eligibility was discretionary. Since there was no sale of part of the roll shop or machine shop businesses as a going concern during that period, the Company did not have occasion to determine whether an employee of either of those shops would be awarded such pay if he or she accepted employment with a purchaser of the going concern. In all the circumstances, and given Emhart's uniform denial of severance pay to employees who had continued to work for purchasers of other subsidiaries or divisions sold as going concerns, we cannot conclude that a decision to deny severance pay to plaintiffs under the pre-1986 practice was arbitrary or capricious. *See, e.g., Schwartz v. Newsweek, Inc.*, 827 F.2d at 882; *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 115 (arbitrary-and-capricious standard applies to review of denial of ERISA benefits where benefit plan gives plan administrator or fiduciary discretionary authority to construe plan's terms or to determine eligibility for benefits).

B. The Common-Law Contract Claims

ERISA preempts state law regarding any matters that "relate to" employee benefit plans, 29 U.S.C. § 1144(a). ERISA was intended to occupy fully the field of employee benefit plans and to establish that field "as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). *See*

alsoFort Halifax Packing Co. v. Coyne, 482 U.S. at 7-8. Accordingly, ERISA preempts civil actions against employers for severance pay predicated on common-law contract principles. *Gilbert v. Burlington Industries, Inc.*, 765 F.2d at 328.

Plaintiffs contend that under *Firestone Tire & Rubber Co. v. Bruch*, 498 U.S. 101, they may bring an action under ERISA to enforce rights created by common-law contract principles. They argue that ERISA's preemption of state law means only "that the parochial case law of one single state does not control the result," and that "[s]tate court common law decisions considered on a multi-state basis are not the decisions of 'state law' preempted by" ERISA. (Plaintiffs' brief on appeal at 36.) Thus, they contend that contract principles common to many states may be viewed as a sort of federal common law that ERISA does not preempt. Arguing further that under pre-ERISA state law, an employer's severance plan constituted a unilateral offer that employees accept by continuing to work for the employer, plaintiffs contend that an employer's elimination of a severance plan constitutes a breach of that contract. Plaintiffs rely principally on language in the *Firestone* opinion stating that the Court was rejecting a "reading of ERISA [that] would...impose a standard of review that would afford less protection to employees...that they enjoyed before ERISA was enacted." 489 U.S. at 114. Given the narrow question considered in *Firestone*, this statement does not have the significance plaintiffs impute to it.

Prior to *Firestone*, most circuits had held that "[i]n actions challenging the denial of benefits under an ERISA plan, review is limited to determining whether the administrator's decision was arbitrary and capricious." *Schwartz v. Newsweek, Inc.*, 827 F.2d at 881; *see Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 138 (3rd Cir. 1987)(collecting cases), *aff'd in part and rev'd in part*, 489 U. S. 101 (1989). In *Firestone*, the Supreme Court held that unless the plan at issue gives the administrator discretionary authority to construe its terms or to determine eligibility,

a denial of benefits based on plan interpretation is not to be reviewed under the arbitrary-and-capricious standard but rather must be reviewed *de novo*. 489 U.S. at 115.

Firestone did not disturb the classification of severance pay plans as welfare benefit plans, and it therefore did not alter the principle that severance pay plans are modifiable or terminable at will by the employer. *See, e.g., Adams v. Avondale Industries, Inc.*, 905 F.2d at 950 (nothing in *Firestone* "implies the invalidity of the case law excluding amendments of welfare benefit plans from scrutiny under ERISA's fiduciary duty requirements"). *Cf. Belade v. The ITT Corp.*, 909 F.2d 736, 738 (2d Cir. 1990)(per curiam) (*Firestone*) "does not purport to expand the scope of ERISA to include design decisions defining the parameters of a program"). Indeed, accepting plaintiffs' argument would nullify Congress's determination in structuring ERISA that welfare benefit plans such as severance plans should be exempted from the stringent vesting requirements applicable to pension benefit plans.

Firestone did not purport to effect any narrowing of ERISA's preemptive effect. It merely affected the standard for reviewing certain decisions-interpreting ERISA plans.

CONCLUSION

We have considered all of plaintiffs' arguments on this appeal and have found them to be without merit. The judgment of the district court dismissing the complaint is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE EMHART CORPORATION

v.

CONSOLIDATED MASTER DOCKET

CIVIL NO. N-86-510(AHN)

ALL CASES

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This is an action for severance pay under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. 2001 et seq. Plaintiffs were all formerly employed by defendant Emhart Corporation ("Emhart") at its Ansonia Connecticut plant. They claim that upon Emhart's sale of the Ansonia facility in May 1986 they were terminated and are so entitled to severance pay under ERISA. All parties have filed motions for summary judgment. For the reasons explained below, the court grants summary judgment in favor of the defendants.

I

The following facts are not in dispute. Plaintiffs are all former salaried employees of the Farrel Division of USM Corporation ("USM"), a wholly owned subsidiary of Emhart. Plaintiffs worked at Emhart's Ansonia plant in either the "roll shop" or the "machine shop". On average, they have been employed in these capacities for approximately twenty years. Prior to 1968 Farrel Corporation was an independent entity engaged in the manufacture of heavy machinery. In 1968 USM purchased Farrel

Corporation and neither Farrel nor USM paid severance benefits to employees affected by the sale. In 1976 USM was acquired by Emhart in a stock purchase transaction, and again no severance was paid by either company. This action arises out of a third sale of the roll and machine shops in May 1986.

As of 1980, Emhart and its subsidiaries followed a number of different severance pay policies. Farrel, for example, had a written policy providing that a severed employee would receive one week's pay for each year of service to the company up to a limit of twenty-six weeks. In 1980 Emhart began consideration of a company-wide, uniform severance policy. A written policy was considered which, among other things, would have denied severance pay to those employees who retained their positions when the division in which they were employed was sold as an ongoing concern. In December 1981 the Emhart Corporation Compensation Committee rejected this and all other written severance policies. Shortly thereafter, Sherman Carpenter, Emhart's Vice President for Administration, hand wrote on a draft severance plan "Terminate all exiting plans. Establish guidelines - not ERISA policy." Mr. Carpenter issued a formal memorandum on December 17, stating that "all severance policies currently in effect at all U.S. operating units are to be cancelled and eliminated from policy manuals as of December 31, 1981" [emphasis in original]. Carpenter continued:

> As the need arises for severance pay considerations in the future, each respective unit manager should inform group management. Group management should contact the Corporate Vice President Human Resources for final authorization of any severance payments.

In practice, after Mr. Carpenter issued his memorandum, the payment of severance at the Ansonia plant followed a regular pattern. When an employee was involuntarily terminated, not for cause, severance pay would be recommended by the

employee's direct superior, his department head or by Ken Irish, Emhart's Director of Human Resources. The decision was then cleared by Mr. Irish (if he had not made the initial recommendation), the President of Farrel and Royal E. Cowles, Vice President of Human Resources. Between December 17, 1981 and May 1986 Mr. Cowles received severance recommendations for twenty-nine salaried employees. In each case he approved a payment. Nineteen of these employees received severance equivalent to one week's pay for each year of service; six received more that one week's pay and four received less. There is no evidence to indicate that Mr. Cowles rejected severance for any employee during this period.

In 1985 Emhart entered into negotiations with various potential buyers for the sale of the Farrel division. On February 24, 1986 Emhart issued a press release stating that it had signed contracts to sell Farrel's machine shop to the Liebergesell Group (which eventually adopted the name "Farrel Corporation") and the roll shop to SHW Corporation ("SHW"). Both sales were conditioned on the buyers completing satisfactory negotiations with Farrel's unions.

In a letter dated April 28, 1986, Ken Josephson, Group Executive for the Farrel Division, informed all roll shop employees of the sale of their division. The letter announced that the sale would likely close the next day, April 29, and stated that "your employment with USM will cease" on that date. The letter made no specific reference to severance benefits. On April 29 the buyers executed a new contract with Farrel's unions, but postponed the closing until May 2. On that date, a Friday, the roll shop employees received written offers of employment from SHW which were to be accepted by the start of work on Monday, May 5. Also on May 2 the roll shop employees met with Ken Irish and other Farrel executives, who formally announced the sale. Irish informed the employees that if they accepted employment with SHW they would not receive severance payment

from Emhart. The employees were asked to sign a "Change of Status" form which described their departure as "Termination due to Roll Shop sale to SHW. Employee to be hired by SHW". All of the plaintiffs signed the form and accepted new employment with the purchaser, which commenced on May 5. Although the benefits accorded the plaintiffs by SHW changed somewhat, there was no variation in their tasks, salaries or hours from their employment by Emhart on Friday and their employment by SHW on Monday. None of the plaintiffs received severance pay.

The machine shop employees were treated in like fashion. On May 12 Ken Josephson sent a letter similar to his April 28 letter to the roll shop employees, stating that the machine shop employees were being terminated as USM employees and would not receive severance pay. May 12 was the last day of work under Emhart for the machine shop employees. On May 13 all the plaintiff machine shop employees chose to accept work with the purchaser and returned to their jobs as employees of the new Farrel corporation.

Emhart also took action on May 12 to provide benefits for those employees not continuing on with the new owners. It adopted two "Supplemental Unemployment Benefit Plans" ("SUB plans") to cover those employees who were laid off on the dates of sale and who were not offered employment by the purchasers. These employees would receive a supplemental employment benefit of one week's base pay for each year of service, reduced by any notice pay. Both plans provided that "[a]ny employee who does not accept an offer [of employment with the purchaser] is not also eligible for supplemental unemployment benefit[s]."

II

The parties do not dispute that under the two SUB plans, adopted just prior to the sale of the roll and machine shops, the

plaintiffs are not entitled to severance pay. The central issue presented by these motions is whether Emhart was entitled under ERISA to adopt those plans and to discard any previous plans, written or unwritten, under which the plaintiffs might have been entitled to severance. The ERISA statutory scheme divides employee benefits into two categories: "welfare benefits" and "retirement or pension" benefits. 29 U.S.C. 1002(1)-(2). The latter category is subject to an elaborate array of accrual, vesting and funding requirements. 29 U.S.C. 1051, 1081. "Welfare benefits." on the other hand, are unaccrued and non-vested. While subject to certain disclosure and fiduciary requirements (29 U.S.C. 1021-1031, 1101-1114), welfare benefits "are exempt from the more stringent ERISA requirements." *Young v. Standard Oil* (Indiana), 849 F.2d 1039, 1045 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 529 (1988). Primary among these is ERISA's prohibition against the forfeiture of accrued, vested benefits. 29 U.S.C. 1053(a) ("[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age...").

Section 1002 of Title 29, which defines the terms used in ERISA, does not indicate whether severance plans are to be considered welfare benefits or retirement/pension benefits. However, in *Gilbert v. Burlington Indus.*, 765 F.2d 320 (2nd Cir. 1985), *aff'd mem.* 477 U.S. 901 (1986), the second circuit held that an unfunded severance pay policy is an employee welfare benefit plan. *Id.* at 325. The Supreme Court adopted this holding in *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U. S. 17-18 (1987). While Gilbert did not go on to discuss the implications of holding severance plans to be non-vested welfare benefits, a number of other courts of appeal have held, in the words of the fourth circuit, that "employees have no 'right' to these benefits and employers have no continuing obligation to provide them." *Bruning v. Mrs. Smith's Frozen Food Co.*, Nos. 87-1693 and 86-1507, slip op. at __ (4th Cir. Dec. 14, 1989)(available on

LEXIS, USAPP file); *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*,724 F.2d 406,410 (4th Cir. 1983), *cert. denied,* 467 U.S. 1205 (1984)(ERISA did not prohibit modification of severance plans because Congress believed the "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income")(quoting H.R.Rep. No. 807, 93d Cong. 2d Sess. 60 *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4935); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Molyneux v. Arthur Guinness & Sons,* 616 F. Supp. 240, 245 (S.D.N.Y. 1985)("Even where such a decision [not to pay severance to former employees after divestiture of a corporate division] amounts to amendment rather than interpretation of an existing plan, no specific provision of ERISA is violated, since severance pay benefits are not subject to the participation, vesting, and funding requirements of ERISA.") *See also* Shawe & Swerdlin, *You Promised!--May an Employer Cancel or Modify Employee Severance Pay Arrangements?*,44 Md. L. Rev. 903, ___(1985)("It seems clear...from the history of the statute that ERISA vesting provisions will not protect employees severance benefits from retroactive extinguishment.")

Several circuit courts have specifically upheld employers' modification or termination of severance benefits in the context of a sale of a corporate division. In *Sejman v. Warner-Lambert,* Nos. 88-2606, 88-2607 (4th Cir. Dec. 24, 1989), defendant Warner-Lambert sold its Medical-Surgical Division as a going concern to another corporation. Warner-Lambert maintained a severance policy for its employees which provided for payment upon termination for reasons other that violation of its rules and regulations. It interpreted this policy to exclude severance pay for employees who continued to work for a new owner of a division who provided similar salary and benefits. Following the sale the plaintiffs, all employees of the Medical-Surgical Divi-

sion, continued to work for the new owner at the same jobs, in the same location, at the same salary and with comparable benefits. Three years after the sale the plaintiffs were terminated and received severance pay well below that to which they would have been entitled under the Warner-Lambert policy. Upon Warner-Lambert's refusal to provide severance, the plaintiffs brought suit.

The fourth circuit held that ERISA imposed no obligation on Warner-Lambert to provide severance at any level:

> Because, under ERISA, severance benefits are contingent and unaccrued, an employer may unilaterally amend or eliminate the provisions of a severance plan, which is usually funded solely by the employer in any event.... Nothing in ERISA thus required Warner-Lambert to pay plaintiffs at 1981 benefit levels or to provide continuing coverage for them under its severance policy. Plaintiffs' interest in the severance plan did not vest simply because they once were covered by it .... To vest severance pay benefits in the manner appellants suggest would require companies, after the sale of subsidiaries or divisions, to monitor the future careers of all their former employees in order to determine when and why they might eventually leave work.... Requiring such an ongoing obligation for severance payments after employees are employed elsewhere could discourage employers like Warner-Lambert from seeking to ensure that their former employees retain their old positions or encourage such employees to forego severance payments altogether.

Slip op. at_ [citations omitted].[1]

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[1] *Warner Lambert* is arguably distinguishable from this case on the grounds that the plaintiffs did not claim severance pay immediately upon the sale of their division but rather three years later upon termination by the new owner.

(footnote continued on next page)

Similarly, in *Phillips*, supra, defendant Amoco sold its liquid propane gas operations to a buyer which did not credit employees' years of service with Amoco towards their retirement benefits. 799 F.2d at 1466-67. The employees brought suit against Amoco and the buyer, claiming that under ERISA the bargaining away of their years of service with Amoco constituted a breach of fiduciary duty.[2] The eleventh circuit disagreed:

> The district court held that the fiduciary provisions of ERISA are not implicated in the sale of a business merely because the terms of the sale will affect contingent and non-vested future retirement benefits.

Plaintiffs have expended substantial energy in attempting to establish the existence and terms of an Emhart severance policy. They argue that even if a written plan was not formally adopted,

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(Footnote 1 continued)

Here, the plaintiffs claimed severance immediately. In both cases, however, the plaintiffs were terminated and claimed that this event triggered a severance payment from their original employer. The question of law in both cases, therefore, is whether the employers have the right under ERISA to deny severance to terminated employees assured of job continuity with a new owner.

[2] 29 U.S.C. 1104(a)(1) provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries..." A person is a fiduciary with respect to a retirement plan where, *inter alia*, he "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets...[or] has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. 1002(21)(A).

This holding is supported by the fact that ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued.

Id. at 1471.

the virtually automatic granting of severance by Mr. Cowles and Mr. Irish between 1981 and 1986 constituted a *de facto* policy of providing one week's severance for each year with the company. Plaintiffs argue that the adoption of the SUB plans in 1986 which denied them severance constituted a breach of the old policy. They assert that the Supreme Court's recent decision in Firestone Tire & Rubber Co. v. Bruch, 109 S. Ct. 948 (1989), stands for the proposition that this breach should be judged according to state contract law principles. By failing to adhere to the old severance policy, they conclude, Emhart breached its contract with the plaintiffs.

Whatever the merits of this argument, it need not be reached in ruling on these summary judgment motions. Even assuming that a *de facto* plan existed prior to promulgation of the SUB plans, that plan was no more than a non-vested welfare benefit. As such, under the cases cited above, Emhart was free to modify, restrict or terminate it without violating provisions of ERISA. The Firestone case was concerned with the standard used to review an administrator's determination of eligibility under a plan; in other words, his interpretation of its terms and scope. 109 S. Ct at 956 ("As this case aptly demonstrates, the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue"). Firestone did not hold that severance plans are not welfare benefits and as such cannot be modified at the employer's discretion. Had the court so held it would have effectively overruled its 1987 decision in Fort Halifax which, as noted above, adopted the second circuit's holding in Gilbert that severance plans are welfare benefits under ERISA. Thus, because Emhart had the right to adopt the SUB plans--under which both sides agree no severance was due the plaintiffs--the issue of whether the old plan can be interpreted to cover the plaintiffs is irrelevant.

III

The court reads the second circuit's decision in *Schwartz v. Newsweek, Inc.*, 827 F.2d 879 (2d Cir. 1987), as dealing with this issue of plan interpretation and thus not germane to the holding today. *Schwartz* arose out of Newsweek's publication of a monthly magazine called "Inside Sports." Newsweek sold "Inside Sports" to Active Markets, Inc. ("Active") which invited the magazine's employees to reapply for their old positions after the sale. Newsweek told the employees in advance of the sale that it would not pay severance to those accepting positions with Active unless that employment terminated within three months of their hiring date. Approximately nine months after the plaintiffs began their new jobs Active halted publication of "Inside Sports." Active granted the plaintiffs two weeks severance pay and Newsweek denied their request for an additional payment. The plaintiffs then commenced an action against Newsweek alleging that they should have been granted severance pay upon sale of the magazine . They based their claim on provisions of their union's collective bargaining agreement and on Newsweek's Supervisor's Manual.

The district court granted Newsweek's motion for summary judgment and the second circuit affirmed. The court began with the assumption that Newsweek had an operating severance plan. 827 F.2d at 881 ("The parties agree that Newsweek's unfunded severance pay policy constitutes an 'employee welfare benefit plan' within the meaning of ERISA"). It held that as the administrator of the plan, Newsweek was a fiduciary with respect to the plan's beneficiaries, i.e., its employees. *Id.* The issue for the court to decide "in actions challenging the denial of benefits under an ERISA plan," it held, is "whether the administrator's decision was arbitrary and capricious." Id. [emphasis added]. The court held that Newsweek's decision not to pay severance "clearly passes muster for the following reasons:

(1) it was publicly announced; (2) it neither deceived the plaintiffs nor defeated their reasonable expectations; (3) it treated all Newsweek employees uniformly; (4) it was a reasonable interpretation of the Supervisor's Manual; and (5) it was sensible." Id. at 882.

Unlike this case, Newsweek did not adopt new severance plans which explicitly excluded the plaintiffs. The plan at issue was set forth in the Supervisor's Manual while the plaintiffs were Newsweek employees, at the time of the sale to Active, after the sale was consummated and at the time Active ceased publication of "Inside Sports." Thus, the issue facing the court was the meaning and reasonableness of a plan which all parties agreed governed their rights. The court did not question Newsweek's right to modify or terminates that plan because Newsweek had not attempted to do so.

Here, the plaintiffs hotly dispute the applicability of the SUB plans and make exactly the opposite claim from the Schwartz plaintiffs: that Emhart had no right to terminate the old *de facto* plan and adopt the SUB plan. The two cases simply address two different situations. The plaintiffs here have conceded that they have no rights under the SUB plans, so the Schwartz inquiry into their reasonableness is inapplicable. The question of whether ERISA permits alteration of preexisting severance benefits has been answered above in the affirmative. Thus, a Schwartz analysis of the scope and reasonableness of the old *de facto* plan would be superfluous.

IV

At oral argument plaintiffs appeared to shift the basis for their claimed entitlement to severance pay. Counsel argued that various actions by Emhart amounted to a contractual offer to provide severance and that the plaintiffs accepted that offer by continuing their employment with Emhart on the assumption

that severance benefits were secure. ERISA, counsel asserted, does not make such contracts unenforceable. This argument flies in the face of the plain language of the statute, which provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. 1144(a). This language has specifically been held to preempt state law breach of contract claims. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985). Accordingly, the court holds that to the extent the complaint asserts a breach of contract claim, that claim is preempted by ERISA.

CONCLUSION

For the foregoing reasons Emhart's motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied.

SO ORDERED this 16th day of February, 1990 at Hartford, Connecticut.

Alan H. Nevas
United States District Judge

3/26/90. The motion for reconsideration is GRANTED. After reconsideration and reflection the court reaffirms and declines to alter its ruling dated February 16, 1990.

SO ORDERED: Alan H. Nevas, U.S.D.J.

APPENDIX C

UNITED STATE COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the First day of February, one thousand nine hundred and ninety-one.

ROBERT REICHELT, CATHERINE PELLETIER, PAUL S. JUZWISHEN, ALLEN A. MICHEWICH, FRANK A. MISIEWICZ, WILLIAM J. MUELLER, JOSEPH M. SCAVONE, LINDA A. SHINGARA, JOHN D. SWEENEY, HENRY W. WAJDOWICZ, and All Class members,
Plaintiffs-Appellants,

DOCKET NUMBER

-v.-

90-7400

EMHART CORPORATION, USM CORP., AND ROYAL E. COWLES,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiffs-appellants, Robert Reichelt, Catherine Pelletier, Paul Juzwishen, Allen A. Michewich, et al., and all class members,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

APPENDIX D

STATUTORY PROVISIONS INVOLVED

"ERISA," 29 U.S.C. §§ 1001 Et Seq.:

§ 1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries. The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) [29 USCS § 1024(b)] to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan-

(1) a summary plan description described in section 102(a)(1)[29 USCS § 1022(a)(1)]; and

(2) the information described in sections 104(b)(3) and 105(a) and (c) [29 USCS §§ 1024(b)(3), 1025(a) and (c)];

(b) . . .

* * *

§ 1022. Plan description and summary plan description

(a) (1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b)[29 USCS § 1024(b)]. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1)[29 USCS § 1024(b)(1)].

(2) A plan description (containing the information required by subsection (b) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1)[29 USCS § 1024(a)(1)]. Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D)[29 USCS § 1024(a)(1)(D)].

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustee (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits;circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 USCS § 1133]).

* * *

§ 1024. Filing and furnishing of information

(a) . . .

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan. Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 102(a)(1)[29 USCS § 1022(a)(1)]-

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part . . .

* * *

§ 1102. Establishment of plan

(a) Named fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) . . .

(b) Requisite features of plan. Every employee benefit plan shall-

(1) . . .

(3) provide a procedure to amend such plan, and for identifying the persons who have authority to amend the plan, and

(4) . . .

* * *

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought-

(1) by a participant or beneficiary-

(A) . . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) . . .

§ 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall-

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

* * *

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USCS § 1201,] or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USCS § 1132]shall be applicable in the enforcement of this section.

* * *

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a)[29 USCS § 1003(a)] and not exempt under section 4(b)[29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

(b) . . .

(c) Definitions. For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The terms "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

APPENDIX E

ERISA REGULATIONS INVOLVED:

29 CFR § 2520. 102-2 Style and format of summary plan description.

(a) Method of presentation. The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. In fulfilling these requirements, the plan administrator shall exercise considered judgment and discretion by taking into action such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Consideration of these factors will usually require the limitation or elimination of technical jargon and of long complex sentences, the use of clarifying examples and illustrations, the use of clear cross references and a table of contents.

(b) General format. The format of the summary plan description must not have the effect to misleading, misinforming or failing to inform participants and beneficiaries. Any description of exception, limitations, reductions and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. . .

APPENDIX F

PARTIAL LIST OF STATE COURT
COMMON LAW SEVERANCE PAY DECISIONS
IN FAVOR OF EMPLOYEES

Gerson v. Diamond Shamrock, Corp.
710 S.W.2d 368 (Mo. App. 1986)

Bolling v. Clevepak Corp.
484 N.E. 2d 1367 (Ohio App. 1984)

Demerath v. Nestle Co., Inc.
358 N.W. 541 (Wisc. 1984)

Kulins v. Malco
459 N.E.2d 1038 (Ill. App. 1984)

Dulany Foods v. Ayers
220 Va. 502, 260 S.E. 2d 196 (1979)

Dahl v. Brunswich Corp.
227 Md. 471, 356 A.2d 221 (1976)

Dangett v. ASG Industries, Inc.
558 P.2d 379 (Okla. 1976)

Gaydos v. White Motor Corp.
54 Mich. App. 143, 220 N.W.2d 697 (1974)

Chapin v. Fairchild Camera Instruments Corp.
31 Cal. App. 3rd 192, 107 Cal. Rptr. 111 (1973)

Clarke v. Brunswick Corp.
211 N.W. 2d 101 (Mich. App. 1973)

Hinkeldey v. Cities Services Oil Co.
470 S.W.2d 494 (Mo. 1971)

Mace v. Conde Nast
155 Conn. 680, 237 A.2d 360 (1967)

Willets v. Emhart Mfg. Co.
152 Conn. 487, 208 A.2d 546 (1965)

Anthony v. Jersey Central P & L Co.
51 N.J. Super., 139, 143 A.2d 762 (1958)

Adams v. Jersey Central P & L Co.
36 N.J. Super. 53, 114 A.2d 776 (1955),
aff'd 21 N.J. 8, 120 A.2d 737 (1956)

Hercules Powder Co. v. Brookfield
189 Va. 531, 53 S.E.2d 804 (1949)

In Re Public Ledger
161 F.2d 762 (3rd Cir. 1947)

Montefalcone v. Banco D. Napoli Trust Co.
268 App. Div. 636, 52 N.Y.S. 2d 655 (1945)

Matthews v. Minnesota Tribute Co.
215 Minn. 369, 10 N.W. 2d 230 (1943)

EXCERPTS FROM PAGES A-97 AND A-99 OF THE PARTIES' JOINT APPENDIX, COURT OF APPEALS.

(The following statement of undisputed facts was filed with the plaintiff's motion for summary judgment in the District Court and these excerpts were "deemed to be admitted" pursuant to Local Rule 9(c)(1) because they were not controverted by the defendants' Local Rule 9(c)(2) counter-statement)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Consolidated Master Docket
Number N-86-510 (AHN)

IN RE EMHART CORPORATION

All Cases

PLANTIFFS' STATEMENT OF MATERIAL FACTS
ABOUT WHICH THERE IS NO
GENUINE ISSUE TO BE TRIED
(Local Rule 9(c)(1))

1. . . .

9. Prior to the sales on May 2 and 12, 1986 there had never been a sale of assets divestiture of all or any part of Farrel as a going concern where some of its employees immediately went to work for the purchaser.

10. There is no evidence that the plaintiffs relied on or were even aware of the severance pay practices, if any, followed in

divestiture situations involving other members of the Emhart family.

11. There is no evidence that the plaintiffs relied on or were even aware of the severance pay pratices (or non-severance pay practices) followed by members of the Emhart family other than Farrel.

12. . . .

Supreme Court, U.S.
FILED
JUN 3 1991
OFFICE OF THE CLERK

No. 90-1675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT REICHELT, PAUL S. JUZWISHEN, ALLEN A. MICHEWICH, FRANK A. MISIEWICZ, WILLIAM J. MUELLER, JOSEPH M. SCAVONE, LINDA A. SHINGARA, JOHN D. SWEENEY, HENRY W. WAJDOWICZ, and CATHERINE PELLETIER, *Petitioners*,

v.

EMHART CORPORATION and USM CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION

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Dated: June 3, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's grant of summary judgment to respondents and correctly held that (1) because under ERISA, welfare benefits such as severance benefits of the type at issue here are not vested, an employer is free to adopt, modify or eliminate such benefits; (2) petitioners are not entitled to severance benefits under the terms of respondents' only applicable severance pay plan; and (3) even if Emhart's ad hoc severance practice constituted an unwritten plan, under such a plan the administrator had discretionary authority to determine eligibility for benefits and it was not arbitrary or capricious to deny petitioners severance benefits under this practice.

PARTIES TO THE PROCEEDINGS

Nine of the petitioners, Robert Reichelt, Paul S. Juzwishen, Allen A. Michewich, Frank A. Misiewicz, William J. Mueller, Joseph M. Scavone, Linda A. Shingara, John D. Sweeney, and Henry W. Wajdowicz, were plaintiffs in individual actions brought in the United States District Court for the District of Connecticut. During pre-trial proceedings, these individual actions were consolidated with each other and later with a certified class action brought by class representative Catherine Pelletier. The nine individual petitioners and class representative Catherine Pelletier were appellants in the court of appeals.

The defendants in the individual actions in the district court, and appellees in the court of appeals, were Emhart Corporation, its wholly-owned subsidiary USM Corporation, and Royal E. Cowles, Emhart's former Vice President for Human Resources. Only USM Corporation was named as a defendant in the class action. Petitioners maintain that Royal E. Cowles is also a respondent to this Petition. However, Cowles was dismissed from this action by the district court. Petitioners did not challenge his dismissal on appeal, and the Court of Appeals did not address the issue of his dismissal. Therefore, Cowles is not a party to these proceedings.

Emhart Corporation is now a wholly-owned subsidiary of Black & Decker Inc., which is a wholly-owned subsidiary of The Black & Decker Corporation. At the time these actions were filed, USM Corporation was a wholly-owned subsidiary of Emhart Corporation. USM Corporation has since changed its name to Emhart Enterprises Corporation and has been merged into Emhart Industries, Inc., which is a wholly-owned subsidiary of Emhart Corporation. Emhart Industries, Inc. has the following non-wholly-owned subsidiaries:

Emhart Investments B.V.
Black & Decker Group Inc.

Emhart Sweden Holdings A.B.
Black & Decker, S.A. de C.V.
Nippon Pop Rivets & Fasteners Ltd.
Trallfa True Temper (Malaysia) Sdn. Bhd.
Black & Decker Canada (1989) Inc.
Black & Decker GmbH
DOM Sicherheitstechnik GmbH & Co. KG
Tucker GmbH
Emhart Asia Limited
Black & Decker (Norge) A/S
Empire Insurance Limited
Emhart Pension Company Limited
Emhart Zurich S.A.

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Sejman v. Warner-Lambert Co., 889 F.2d 1346 (4th Cir. 1989), *cert. denied*, 111 S. Ct. 43 (1990) 10-11
Sutton v. Weirton Steel, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) 12-13
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1675

ROBERT REICHELT, PAUL S. JUZWISHEN, ALLEN A. MICHEWICH, FRANK A. MISIEWICZ, WILLIAM J. MUELLER, JOSEPH M. SCAVONE, LINDA A. SHINGARA, JOHN D. SWEENEY, HENRY W. WAJDOWICZ, and CATHERINE PELLETIER,

Petitioners,

v.

EMHART CORPORATION and USM CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Emhart Corporation and USM Corporation respectfully request that the Court deny the Petition for Writ of Certiorari in this matter, seeking review of the decision and judgment of the United States Court of Appeals for the Second Circuit entered on December 11, 1990, and its denial of the Petition for Rehearing entered on February 1, 1991.

COUNTERSTATEMENT OF THE CASE

Petitioners are all former salaried employees of the Ansonia, Connecticut plant of what used to be the Farrel Division of USM Corporation ("USM"), which was, prior to the sales at issue, a wholly-owned subsidiary of Emhart Corporation ("Emhart"). [A2]. Petitioners claim they are entitled to severance pay as a result of the sales of Farrel's roll shop and machine shop, even though they continued in their employment with the purchasers of the Farrel roll and machine shops, in essentially the same positions, at the same salaries and with substantially the same benefits.[1] [A17-A18].

Petitioner Reichelt's claim was initially filed in state court in Connecticut alleging a breach of contract. The suit was removed to federal court and Reichelt subsequently amended his complaint to assert a claim under ERISA. The complaints of the remaining individual petitioners followed and were consolidated with Reichelt's complaint. The class action, also filed in federal court in Connecticut, was later consolidated with the other complaints in this matter. All state law causes of action were dismissed by the district court. In February 1990, the district court granted respondents' summary judgment motion, dismissed Cowles as a defendant, and denied petitioners' cross-motion for summary judgment.[2] On December 11, 1990, the United States Court of Appeals for the Second Circuit affirmed the decision of the district court and, on February 1, 1991, the Second Circuit denied petitioners' Petition for Rehearing.

---

[1] Petitioners retained all of their vested ERISA benefits, such as pension benefits, and most of their welfare benefits, such as health insurance. Employees who were permanently laid off within a certain time after the sale (none of petitioners were among this group) also received severance benefits pursuant to the SUB Plans. [A6].

[2] A page of the district court's unpublished opinion, which is page A22 of petitioners' appendix, mistakenly reproduced part of a block quotation in the district court's opinion as a footnote. This page is reprinted as page RA1 of Respondents' Appendix.

In summarizing the facts for review, it is important to note that petitioners do not contend that the courts below erroneously relied on any disputed facts. Rather, petitioners argue that the courts below chose to ignore as immaterial to their decisions certain undisputed facts.[3] The undisputed material facts, as relied on by the courts below, are as follows.

From 1968 until May 1986, Farrel was a division of USM, and from 1976 USM was a wholly-owned subsidiary of Emhart. At the time that USM Corporation acquired the previously independent Farrel Corporation in 1968, no severance pay was paid to the employees of Farrel Corporation by either Farrel Corporation or USM Corporation. In 1976, when USM was in turn acquired by Emhart Corporation, no severance pay was paid to employees of the Farrel roll and machine shops by either USM or Emhart. [A4; A15-A16].

Sometime in 1980, Emhart began to consider the adoption of a uniform severance pay plan for all of its subsidiaries and divisions. In December 1981, Emhart decided that instead of adopting a uniform severance pay plan, it would eliminate all existing severance pay plans, policies and practices and thereafter would consider granting severance pay on an *ad hoc* basis. Thereafter, if division management thought that an employee should be given severance pay because of the circumstances of

---

[3] In their statement of the case, petitioners refer to many alleged undisputed facts without record citation. Although most of these factual issues are indeed not in dispute, petitioners have failed to reproduce the necessary portions of the record in their appendix. Pursuant to Supreme Court Rule 15, respondents note throughout this brief those facts which they and the courts below agree are material, with citations to the Second Circuit's and district court's reliance on those facts. Additionally, respondents specifically contest petitioners' statement that the amount at issue in this case is $4 million. [Petition for a Writ of Certiorari at p. 3]. This amount is nowhere of record, and was never put in issue with the district court.

his or her termination, the division management would make a recommendation to the Vice President for Human Resources, who had the discretion to decide whether to grant any severance pay and to determine the amount, if any, to be granted. This policy became effective January 1, 1982 and was announced by a memorandum from Sherman Carpenter, Emhart's Vice President for Administration. [A16-A17].

Between December 17, 1981 and May 1986, Emhart, including its Farrel division, adhered to the procedure set forth in Carpenter's memorandum. Recommendations for severance pay were made by group and division management within Emhart to Royal Cowles, the Vice President of Human Resources, who had the discretion to approve the granting of severance pay. [A11-A12]. Between December 17, 1981 and May 1986, Cowles approved severance pay for twenty-nine salaried employees, nineteen of whom received one week's pay for each year of service, six of whom received more than one week's pay for each year of service, and four of whom received less. [A5]. Between 1982 and 1986, Emhart sold many of its divisions and subsidiaries. In these situations, Emhart's consistent practice was not to pay severance pay to employees who continued their employment with the purchaser. In cases where Emhart decided to pay severance to a group of employees who would lose their jobs as a result of a plant closing or sale of a portion of its business, Emhart's practice was to adopt a formal, written ERISA plan to cover those employees. [A5-A6].

In May 1986, Emhart sold the Ansonia plant of USM Corporation's Farrel Division in two separate transactions. The roll shop was sold to SHW Corporation and the machine shop was sold to a newly-formed Farrel Corporation. On May 2, 1986, roll shop employees met with Farrel executives. At that meeting, the sale was announced. Ken Irish, Director of Human Resources for Farrel, specifically stated that Farrel employees who

were offered employment with SHW would not be given severance pay. All of the individual petitioners accepted employment with SHW Corporation in essentially the same jobs and at the same salary they had been receiving previously. All continued their employment with the purchaser beginning the following week, in the same jobs, at the same salaries and with substantially the same benefits. [A17-A18]. The machine shop was sold to the newly-formed Farrel Corporation on May 12, 1986. Employees who went to work for the purchaser were told that they would not receive severance pay unless they were laid off later that year. The machine shop employees continued their employment with Farrel Corporation in the same jobs on that date, also at the same salaries and with substantially the same benefits. [A17-A18].

On May 12, 1986, Emhart adopted two ERISA welfare benefit plans to provide supplemental unemployment benefits to employees of the Farrel roll shop and machine shop who were permanently laid off after February 1, 1986 and not offered jobs with the purchasers or who were permanently laid off by the buyer after the sale during 1986. [A3-A4; A6; A18]. These Supplemental Unemployment Benefit Plans ("SUB Plans") specifically provided that employees who accepted or were offered a job with the purchaser and not subsequently permanently laid off during 1986 would not be eligible for any benefits. The supplemental unemployment benefit under the SUB Plans was one week's pay for each year of service, reduced by any notice pay. Employees who quit, retired or were discharged for cause were not eligible for the benefit. [A6]. As the district court below specifically noted, the limitations paragraphs of the SUB Plans specifically made the Plans applicable to employees in petitioners' situation by providing, "any employee who accepts a job with [the purchaser] is also not eligible for supplemental unemployment benefits. Any employee who does not accept an offer of a job with [the purchaser] is also not

eligible for supplemental unemployment benefits," unless an employee was permanently laid off within a certain time after the sale. [A18].

SUMMARY OF REASONS FOR DENYING THE WRIT

The courts below correctly decided that, because under ERISA severance benefits of the nature involved here are unvested welfare benefits, Emhart was free to adopt the SUB Plans to apply to the Farrel sales, notwithstanding any prior severance practice or plan. The United States Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), does not affect an employer's unfettered ability to modify or terminate ERISA welfare benefits. As the courts below found, the SUB Plans are the only ERISA plans which govern the question of petitioners' entitlement to severance benefits at the time of the Farrel sales, and the SUB Plans clearly provide that petitioners are not entitled to such benefits.

The Second Circuit also correctly decided in the alternative that even if benefit eligibility were to be determined under the past severance pay practice, which petitioners allege existed at Emhart and constituted an ERISA plan, that practice gave complete discretion to Emhart to decide under what circumstances severance benefits would be paid. Thus, in accord with the Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, the Second Circuit decided that any decision to grant or deny severance pay under this alleged practice should be reviewed according to an arbitrary and capricious standard. Under this standard, the Second Circuit correctly held that petitioners would not be entitled to benefits.

REASONS FOR DENYING THE WRIT

I. THE COURTS OF APPEALS ARE IN AGREEMENT THAT UNDER ERISA, SEVERANCE BENEFITS OF THE TYPE INVOLVED HERE ARE NOT VESTED, AND AN EMPLOYER IS FREE TO ADOPT, MODIFY OR ELIMINATE SEVERANCE BENEFIT PLANS.

The decisions of the court below are in accord with all of the five other federal appellate courts which have considered the issue, holding that, because under ERISA severance benefits of the type involved here are not vested, an employer is free to change such benefits at any time. This Court has repeatedly declined to review such decisions.

According to petitioners, under the pre-ERISA common law of contracts, an employer would not be allowed to "take away" severance benefits once such benefits had been promised to and "earned" by an employee. Petitioners cite numerous state court severance pay cases decided, mostly prior to ERISA's enactment, under a common law contract analysis, to argue that, prior to ERISA's enactment, employees had a vested right to severance pay, which they had earned by virtue of their years of service with an employer. Petitioners further argue that the Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), restores common law contract analysis to the determination of severance benefit entitlement under ERISA. This is simply not the case. As every one of the courts of appeals considering the issue has held, ERISA has quite plainly changed the common law as it applies to severance benefits, such as those claimed in this case, making such benefits unvested. Further, *Firestone* simply does not address the question of when an employer may modify or eliminate unvested benefits.

The severance pay at issue in this case is a welfare benefit under ERISA,[4] *Gilbert v. Burlington Indus., Inc.*,

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[4] *See* 29 C.F.R. § 2510.3-2(b) (1990). This ERISA regulation provides that a severance pay plan is *not* a pension plan under

765 F.2d 320, 325 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986), and welfare benefits are unvested, contingent rights, which may be altered unilaterally by an employer at any time. *Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S 981 (1988). ERISA expressly defines which types of benefits are vested benefits, which may not be altered once they have vested. These are only benefits such as retirement or pension payments, not those benefits covered by welfare benefit plans. 29 U.S.C. § 1051; *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987).

As the appellate courts have consistently held, under ERISA employers owe a duty to employees with respect to amending plans only where employees have vested rights, as they do in pension or retirement benefits for which contributions have been made by an employee or on an employee's behalf on a continuing basis. *Young v. Standard Oil*, 849 F.2d at 1045. However, in the case of unvested, contingent benefits, such as those represented by an employee welfare benefit plan like a severance pay plan, the courts of appeals have consistently held that the employer is free to amend the plan at any time, for any purpose, even without notice to employees, and the Court has consistently declined to review such decisions.

The Second Circuit, in accord with the district court in this matter, found that Congress structured ERISA so as to give employers "considerable flexibility with respect to welfare plans." [A8]. As the Second Circuit said:

ERISA so long as (1) the payments are not contingent on the employee's retiring, (2) the total amount of such payments does not exceed twice the employee's annual compensation, and (3) the payments are completed within 24 months after the employee's termination. This regulation is reprinted in Respondents' Appendix at RA2-RA3.

> Since severance benefits are welfare benefits and an employee's interest in a welfare benefit plan is not vested, the employer has no continuing obligation to provide severance benefits; under ERISA, the employer has the right at any time to amend or terminate a severance pay plan.

(A9, citing and relying on *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 111 S. Ct. 517 (1990); *Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988); *Sutton v. Weirton Steel*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); and *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987)).

In *Adams v. Avondale Indus., Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, 111 S. Ct. 517 (1990), the Sixth Circuit held that an employer had the right to amend a severance plan immediately before a sale to preclude payment of benefits to employees affected by the sale. As in this case, in *Adams*, the employer, Avondale, maintained an unwritten policy of providing salaried employees who were involuntarily terminated with severance benefits. Less than two weeks before the sale of one of its divisions, Avondale distributed a written severance plan to some, but not all, of the employees who would be affected by the sale. The written plan provided that severance benefits would not be paid to employees who continued to work for the purchaser.

Following the line of cases relied on by the Second Circuit and the district court, which hold that welfare benefit plans may be amended by an employer at any time, the Sixth Circuit held that the employer had the right to adopt its new plan:

> In drawing the line between employer actions subject to the fiduciary duty requirement and those not, we must avoid any rule that would have the effect of

> undermining Congress' considered decision that welfare benefit plans not be subject to a vesting requirement. We are compelled, therefore, to reject plaintiffs' proposed rule that welfare benefit plans such as the one before us be amended or terminated only when such action would be in the best interests of the employees. To adopt such a requirement would, in effect, accord employees a vested right to welfare benefits, thereby upsetting ERISA's delicate balance in this area. Instead, we employ the rule . . . that a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan. *In so doing, we join the majority of circuits that have already ruled on this issue.*

Adams v. Avondale, 905 F.2d at 947 (citations omitted, emphasis added). The Sixth Circuit specifically held:

> Finally, we note that nothing in the Supreme Court's recent decision in [*Firestone Tire & Rubber Co. v. Bruch*] implies the invalidity of the case law excluding amendments of welfare benefit plans from scrutiny under ERISA's fiduciary duty requirements . . . The Supreme Court's holding in *Bruch* was explicitly "limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations."

Adams v. Avondale, 905 F.2d at 950 (citations omitted).

In *Sejman v. Warner-Lambert Co.*, 889 F.2d 1346 (4th Cir. 1989), *cert. denied*, 111 S. Ct. 43 (1990), the case primarily relied on by the district court below in deciding the parties' summary judgment motions, the Fourth Circuit reached the same conclusion in another factually similar situation. In *Sejman*, the employer interpreted its severance policy, which did not have an express exclusion for sale situations, to provide that employees who continued to work for a purchaser in the same jobs and with similar salaries and benefits, were not eligible for severance pay.

According to the Fourth Circuit:

> Because, under ERISA, severance benefits are contingent and unaccrued, an employer may unilaterally amend or eliminate the provisions of a severance plan, which is usually funded solely by the employer in any event . . . Nothing in ERISA thus required Warner-Lambert to pay plaintiffs at 1981 benefit levels or to provide continuing coverage for them under its severance policy. Plaintiffs' interest in the severance plan did not vest simply because they once were covered by it.

Sejman v. Warner-Lambert, 889 F.2d at 1348-49 (citation omitted). *See also Bruning v. Mrs. Smith's Frozen Food Co.*, 894 F.2d 401 (4th Cir. 1989) (text in Westlaw) ("employees have no 'right' to these [severance] benefits and employers have no continuing obligation to provide them."); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1159-60 (3d Cir. 1990) (welfare benefit plans are exempted from vesting requirements; such benefits may be eliminated by employer without violating duty to employees because decision to eliminate is a plan creation or design decision, not a plan administration decision).[5]

Likewise, in *Young v. Standard Oil, supra*, the employer decided to divest itself of a particular division, and negotiated to sell the division. It became clear during the negotiations that while the purchaser would offer the employees employment, it would not be comparable to their employment with Standard Oil. Under those circumstances, the employees would be entitled to benefits under Standard Oil's existing severance pay plan. *Spe-*

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[5] Petitioners imply that the court's decision in *Hozier* says that a welfare benefit plan cannot be unilaterally amended without express reservation of the power to do so. This is not the case. The court in *Hozier* specifically declined to reach this issue. Rather, it only decided that ERISA prohibits oral amendments to written plans. 908 F.2d at 1163 & n.9.

cifically to avoid paying severance benefits, Standard Oil amended its severance pay plan to provide that employees who received *any* offer of employment from a purchaser, whether comparable employment or not, would not be eligible for severance pay. Employees were not told of the change in the policy until at least one month *after* the sale, after they had to decide whether or not to accept employment with the purchaser. The Seventh Circuit decided that this change in Standard Oil's severance plan did not violate ERISA. The court specifically held:

> An employer may . . . unilaterally amend or eliminate a severance plan without violating ERISA. . . . This is so because an employer is permitted to act in a dual capacity as both the manager of its business and a fiduciary with respect to unaccrued benefits. An employer is therefore, free to alter or eliminate severance benefits (which are usually solely funded by the employer) without consideration of the employees' interests. . . . In short, an employer does not owe its employees a fiduciary duty when it amends or abolishes a severance benefit plan.

849 F.2d at 1045 (citations omitted).

The Seventh Circuit in *Young* relied on the distinction in ERISA between welfare benefit plans and pension benefit plans. The court noted that ERISA imposes stringent accrual, vesting and funding requirements on pension plans, but not on welfare plans. Because the severance pay plans at issue were welfare benefit plans, they were not subject to ERISA's more stringent requirements. 849 F.2d at 1045.

The Seventh Circuit in *Young* relied on the reasoning of the Fourth Circuit in *Sutton v. Weirton Steel*, 724 F. 2d 406, 410-12 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). In *Sutton*, prior to selling a steel mill, the employer amended its severance pay plan to provide specifically that the sale would not trigger the payment of severance. The employees challenged this change. The

Fourth Circuit held that the employer did not violate any fiduciary duty to employees by unilaterally altering either unfunded, contingent retirement benefits or severance benefits.

The same conclusion was also reached by the Eleventh Circuit, which held that where contingent, non-vested benefits under ERISA, such as severance pay benefits, are affected by the sale of a business, "ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued." *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). *Phillips* involved the claims of former Amoco employees, who were re-employed by a purchaser of part of Amoco's business, under Amoco's retirement plan. The Eleventh Circuit held that:

> [T]he fiduciary provisions of ERISA are not implicated in the sale of a business merely because the terms of the sale will affect contingent and non-vested future retirement benefits. This holding is supported by the fact that ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued. Moreover, the ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interests as employer [by altering these benefits as part of the terms of a sale] when not administering the plan or investing its assets.

799 F.2d at 1471 (citing *Sutton v. Weirton Steel*, *supra*, 724 F.2d 406 (4th Cir. 1983)).

The courts below correctly relied on this uncontroverted line of cases in holding that Emhart had the right to adopt the SUB Plans, which provided that severance benefits would be paid as a result of the sales only in certain limited circumstances. Severance benefits are neither vested nor accrued and thus, according to the

consistent decisions of the federal appellate courts, which the Court has consistently declined to review, Emhart was free to adopt a new plan or to alter any practice it had relating to severance benefits, at any time.

II. THE COURTS BELOW CORRECTLY DECIDED THAT THE SUB PLANS GOVERNED THE QUESTION OF PETITIONERS' ENTITLEMENT TO SEVERANCE PAY, THAT PETITIONERS WERE NOT ENTITLED TO BENEFITS UNDER THESE PLANS, AND THAT PETITIONERS WOULD NOT HAVE BEEN ENTITLED TO BENEFITS UNDER ANY PAST PRACTICE.

Petitioners argue that, because the SUB Plans do not expressly revoke the *ad hoc* practice which petitioners claim existed and constituted a severance pay plan, they therefore remained eligible for severance pay under Emhart's alleged past practice. However, as the courts below found, (1) the SUB Plans were specifically designed to deal with the Farrel sales in question, (2) petitioners were covered by the express terms of the Plans, and (3) they therefore are not entitled to severance benefits.

As the Second Circuit noted, accepting petitioners' argument would lead to a completely incongruous result. According to petitioners' theory, all of the individuals entitled to benefits under the SUB Plans would also have been entitled, as a result of the sale itself, to benefits under the severance practice which petitioners allege existed. Thus, they would have received double severance benefits. Such a result was never intended, and would have resulted in a windfall to these employees. Even petitioners have not argued that any employee should have received a double severance benefit, but they ignore the fact that such a result is compelled by their theory. The SUB Plans applied to petitioners and were the only plans governing their entitlement to severance pay.

Even if the applicability of the SUB Plans, and petitioners' ineligibility for benefits under those Plans, were

not obvious, the Second Circuit reviewed the undisputed facts in this matter, and decided that petitioners were not entitled to severance pay under the practice which petitioners allege existed. The Second Circuit decided that Emhart's policy of giving its Vice President for Human Resources the authority to determine severance pay awards when he received recommendations for such payments constituted a grant of discretion. Therefore, even if Emhart's alleged practice of paying severance benefits in certain situations amounted to an ERISA plan, the Second Circuit held that, under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 115, determinations of eligibility for severance benefits in accordance with that practice should be reviewed under an arbitrary and capricious standard. The Second Circuit decided, upon a review of the undisputed facts existing in this matter, that a denial of severance benefits to petitioners would not have been arbitrary or capricious. [A11-A12].

Because the federal appellate courts have uniformly and correctly decided that under ERISA employers have the right to adopt, modify or eliminate unvested welfare benefits, and because the Second Circuit's decision was in accord with this correct line of decisions, it is unnecessary for the Court to reach the issue of the interpretation of benefit eligibility under this alleged practice. However, the Second Circuit also conducted the review of the factual record necessary to determine that petitioners were not eligible for benefits under the practice they allege existed. It is not necessary for the Court to repeat this factual review to confirm the correctness of the Second Circuit's alternative holding.

III. PETITIONERS ARE INCORRECT THAT *FIRESTONE v. BRUCH* MANDATES THE APPLICATION OF THE STATE COMMON LAW OF CONTRACTS, OR OF A *DE NOVO* STANDARD OF REVIEW, TO THE INTERPRETATION OF ERISA WELFARE BENEFIT PLANS.

In a confused and scatter-shot argument, petitioners attempt to convince the Court that the effect of its decision in *Firestone Tire & Rubber Co. v. Bruch, supra,* was to reinstate a state common law contract analysis to the determination of both procedural and substantive issues regarding welfare benefit plans. The Court could and should deny *certiorari* on this petition *sua sponte* based on Supreme Court Rule 14.5, which provides, "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." Further, petitioners' argument, if accepted on its merits, would completely unsettle ERISA's preemption of state law with respect to the unvested nature of welfare benefits. Instead, it would make these benefits subject to the vagaries of a state-by-state application of common law contract interpretation. This is exactly what Congress intended to avoid when it enacted ERISA to provide for a uniform national policy of employee benefits. *See* 29 U.S.C. § 1001.

Petitioners are also incorrect in arguing that the *Firestone* decision mandates a *de novo* standard of reviewing employee benefit plans. First, *Firestone* applies only to the question of the standard to be used to review an administrator's determination of benefit eligibility under a plan. [A23, citing *Firestone*, 109 S. Ct. at 956]. As the district court said, *Firestone* simply did not hold that severance plans are not welfare benefits and as such cannot be modified at the employer's discretion. [A23]. As the district court pointed out, if *Firestone* stood for

that proposition, it would have effectively overruled the Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 18 (1987), which adopted the Second Circuit's holding in *Gilbert v. Burlington Indus.*, 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986), that severance benefits are welfare benefits under ERISA. This Court's decision in *Firestone* did not affect the unvested nature of welfare benefits, nor did it upset the line of cases holding that such benefits may be changed at any time.

CONCLUSION

Because the decisions of the courts below are in accord with the uniform decisions of other federal appellate courts that severance benefits are unvested welfare benefits which may be modified or eliminated at any time, and because the courts below correctly decided that petitioners were not entitled to severance benefits under any applicable plan, respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: June 3, 1991

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Similarly, in *Phillips, supra*, defendant Amoco sold its liquid propane gas operations to a buyer which did not credit employees' years of service with Amoco towards their retirement benefits. 799 F.2d at 1466-67. The employees brought suit against Amoco and the buyer, claiming that under ERISA the bargaining away of their years of service with Amoco constituted a breach of fiduciary duty.[2] The eleventh circuit disagreed:

> The district court held that the fiduciary provisions of ERISA are not implicated in the sale of a business merely because the terms of the sale will affect contingent and non-vested future retirement benefits. This holding is supported by the fact that ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued.

Id. at 1471.

Plaintiffs have expended substantial energy in attempting to establish the existence and terms of an Emhart severance policy. They argue that even if a written plan was not formally adopted,

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(Footnote 1 continued)

Here, the plaintiffs claimed severance immediately. In both cases, however, the plaintiffs were terminated and claimed that this event triggered a severance payment from their original employer. The question of law in both cases, therefore, is whether the employers have the right under ERISA to deny severance to terminated employees assured of job continuity with a new owner.

[2] 29 U.S.C. § 1104(a)(1) provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries. . . ." A person is a fiduciary with respect to a retirement plan where, *inter alia*, he "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . [or] has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).

§ 2510.3-2 Employee pension benefit plan.

(a) *General.* This section clarifies the limits of the defined terms "employee pension benefit plan" and "pension plan" for purposes of Title I of the Act and this chapter by identifying certain specific plans, funds and programs which do not constitute employee pension benefit plans for those purposes. To the extent that these plans, funds and programs constitute employee welfare benefit plans within the meaning of section 3(1) of the Act and § 2510.3-1 of this part, they will be covered under Title I; however, they will not be subject to parts 2 and 3 of Title I of the Act.

(b) *Severance pay plans.* (1) For purposes of Title I of the Act and this chapter, an arrangement shall not be deemed to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service, provided that:

(i) Such payments are not contingent, directly or indirectly, upon the employee's retiring;

(ii) The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and

(iii) All such payments to any employee are completed,

(A) In the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and

(B) In the case of all other employees, within 24 months after the termination of the employee's service.

(2) For purposes of this paragraph (b),

(i) "Annual compensation" means the total of all compensation, including wages, salary, and any other benefit of monetary value, whether paid in the form of cash or otherwise, which was paid as consideration for the employee's service during the year, or which would have been so paid at the employee's usual rate of compensation if the employee had worked a full year.

(ii) "Limited program of terminations" means a program of terminations:

(A) Which, when begun, was scheduled to be completed upon a date certain or upon the occurrence of one or more specified events;

(B) Under which the number, percentage or class or classes of employees whose services are to be terminated is specified in advance; and

(C) Which is described in a written document which is available to the Secretary upon request, and which contains information sufficient to demonstrate that the conditions set forth in paragraph (b)(2)(ii)(A) and (B) of this section have been met.

* * * *

FILED
JUN 14 1991
OFFICE OF THE CLERK

(3)

No. 90-1675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT REICHELT, CATHERINE PELLETIER, PAUL S. JUZWISHEN, ALLEN A. MICHEWICH, FRANK A. MISIEWICZ, WILLIAM J. MUELLER, JOSEPH M. SCAVONE, LINDA A. SHINGARA, JOHN D. SWEENEY, HENRY W. WAJDOWICZ, and All Class Members,

Petitioners,

VS.

EMHART CORPORATION, USM CORP., and ROYAL E. COWLES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

1. By Their Silence, Respondents Agree That There Are Serious Conflicts Between The Circuits And A Failure To Follow *Firestone v. Bruch.*

Respondents devote only one page (p. 16) of their seventeen page brief to the main thrust of the petition; and most of that one

page is devoted to attacking the competence and brief writing ability of the petitioners' attorney under Supreme Court Rule 14.5 and totally fails to answer on the merits any of the petitioners' arguments as to why certiorari should be granted[1].

Respondents don't answer, discuss or even mention petitioners' most significant cases: *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir. 1990), *cert. den.*, 111 S.Ct. 581 (1990); *Deming v. American Standard*, 905 F.2d 1124 (7th Cir. 1990); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985), *cert. den.*, 477 U.S. 805 (1985); and *Kullins v. Malco, A Microdot Co., Inc.*, 459 N.E.2d 1038 (Ill. 1984).

2. Respondents Have Not Disputed The Irrelevance of Emhart's Prior Severance Practice in Subsidiaries Other Than Farrel.

In their brief respondents continue to point out that Emhart's prior practice in its other divisions and subsidiaries was not to pay severance in the sale of assets divestiture situation despite the fact that (1) in the District Court the respondents agreed that the Farrel employees, including petitioners, were totally unaware of any such practice and did not rely upon it (A-38 and 39), and (2) nowhere in their brief do they dispute the petitioners statements in their petition (pp. 5-6) which show the irrelevance of these practices and also show the irrelevance of the fact that no severance was paid in the prior acquisitions of Farrel's stock by USM and USM's stock by Emhart (where, as in *Vielleux v. Atochem of N.A.*, 929 F.2d 74 (2nd Cir. 1991), the purchaser

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[1] For example, respondents' only response to the preemption issue is to misleadingly misstate Petitioners' position by saying that it would subject ERISA benefits "to the vagaries of a state-by-state application of common law contract interpretation." Respondents know perfectly well that petitioners are urging that state court decisions be used only as a source or guide in the development of a *uniform* national common law of contracts.

continued to be liable for the past service credits earned by the employees' years of service prior to the acquisition).

3. There Were No Discretionary Variations In The Unwritten Prior Severance Practice. It Was 100 Percent Uniform.

On page 4 of their brief respondents reiterate the error of their original summary judgment brief which was erroneously picked up by the District Court (A-17) and the Second Circuit (A-5), namely that there was some (discretionary) variation in the amount of severance paid in ten of the twenty-nine involuntary terminations not for cause which occurred between 1981 and May 1986. In fact, the absolutely undisputed evidence before both courts (pages RB-A3 and 4 in the attached Appendix) was (1) that there were only twenty-five such terminations (p. 5 of the petition inaccurately says "twenty-four"), (2) that severance was paid each time and (3) that the amount of each payment was computed on an identical basis (two weeks' pay for each year of service forregular employees, more for managerial employees).

This 100 percent uniformity of practice with respect to both eligibility and amount is strong circumstantial evidence that the plan administrator did not in fact have any discretionary authority as defined in *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. at 954.

4. There Is No Possibility Of A Double Recovery - The SUB Plans Only Mentioned Employees "On Layoff Status" On The Date Of The Sale And Did Not Apply To The Plaintiffs And Others Who Were Actively Employed By Farrel On The Date Of The Sale.

The SUB plans have all the proper boiler plate including: a "Purpose" clause; an "Eligibility" clause defining who is a "covered" employee; a description of the benefits provided by

the plan (i.e. "supplemental unemployment benefits consisting of one week's pay per year of employment"); a "Limitations" clause (which specifies which of the otherwise "covered" employees may not receive the "supplemental unemployment benefits" provided by the plan). (These clauses are printed on pages RB-A1 and 2 of the Appendix to this Reply Brief).

The SUB plans contain no reference whatsoever to people like the plaintiffs who were actively employed on the day of sale. The SUB plans refer exclusively to people "on layoff". The "Purpose" clause and "Eligibility" clauses refer only to persons "laid off in a reduction in force in 1986", to persons who were "laid off after February 6, 1986 and prior to the date of sale, and who remain on layoff status on the date the Roll [or Machine] Shop is sold". (on that date there actually were some other employees who were on "layoff".) None of the plaintiffs were "laid off" or on"layoff status" on the date of sale. On the contrary, they were actively employed on the date of sale (the phrase "actively employed" is used elsewhere in the plan, so it is clear that the plan makes a distinction between "actively employed" and just plain "employed").

"Laid off" is a term of art not to be confused with "terminated". In the evidence before the Second Circuit, it was undisputed that this terminology meant laid off with a seniority right of recall for three years. It was likewise undisputed in the evidence before the Second Circuit that the prior practice under the unwritten plan was to give severance pay to employees when they were "terminated" but not when they were "laid off".

Hence, all the SUB plans did was to provide a limited benefit for employees on "lay off status" who were not entitled to severance pay under the unwritten plan. The SUB plans had nothing whatsoever to do with the plaintiffs.

Therefore, respondents misread the SUB plans when they say on paragraph 14 of their brief that the "petitioners were covered

by the express terms of the plans." The Second Circuit made a more grievous error in its zeal to reach a similar conclusion. It actually misquoted paragraph 2 of the plans' "Eligibility" clause to include "employees employed by USM on the date of sale and employed by SHW after the date of sale" (All); whereas in the actual document the word "employees" is qualified by the words "Any covered" so that the document (RB-A1) refers to, "Any *covered* Roll shop employee and employed by SHW after the date of sale.". In paragraph 1 of the "Eligibility" clause, "covered" employees are limited to people on "layoff status on the date of sale". Consequently since the plaintiffs were not on "layoff status", nothing in the SUB plans has any application to them. They were not entitled to anything under the "Eligibility" clause so there was nothing which could be taken away from them by the "Limitations" clause.

5. Respondents' Citations In Support Of An Alleged Unfettered Right To Amend Only Involve Claimed Violations Of Fiduciary Duties Imposed By ERISA. Petitioners' Case Is Not Based On Any Such Fiduciary Duty Claim.

Despite all respondents' verbiage on the issue of the right to amend (pp. 9-14 of respondents' brief) and despite their citation of decisions tainted by the arbitrary and capricious standard of review,[2] respondents' brief fails to answer or even discuss page 23 of the petition which distinguishes decisions such as *Adams v. Avondale Industries, Inc.*, 905 F.2d 943 (6th Cir.), *cert. den.*, 111 S. Ct. 517 (1990) on the grounds that they only deal with a

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[2] The respondents also cite the *unpublished* decision in *Bruning v. Mrs. Smith Frozen Food Co.*, 894 F.2d 401 (4th Cir. 1989). It is a horrendous example of a court pretending to apply the new *de novo* standard of review while actually giving deference to the plan administrator's decision (finding the employer's denial of benefits was clearly "justifiable").

claimed breach of fiduciary duty -- an issue which is not even raised in this petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Excerpts from Pages A 25 and A 26 of the Parties' Joint Appendix, Court of Appeals)

USM SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN FOR FARREL DIVISION ROLL SHOP AND FOUNDRY SALARIED EMPLOYEES

The purpose of this Plan is to provide supplemental unemployment benefits to covered Farrel Division Roll Shop and Foundry salaried employees involuntarily unemployed as a result of the closing of the Farrel Division foundry or laid off in a reduction in force during 1986.

Eligibility

1. The Plan covers all active Roll Shop and Foundry salaried employees of the Farrel Division of USM Corporation in Ansonia, Connecticut ("USM") who (a) are permanently laid off after February 1, 1986 and prior to the date of sale, and who remain on layoff status on the date the Roll Shop is sold, or (b) are unemployed by USM on account of the closing of the Foundry operations, and who are not offered employment on the sale of the Roll Shop by Farrel Corporation, provided (c) they release USM from all claims arising out of their layoff or unemployment.

2. Any covered Roll Shop employee employed by USM on the date of sale and employed by SHW Incorporated after the date of sale of the Roll Shop, will also be eligible to receive supplemental unemployment benefits if he is permanently laid off by SHW Incorporated during 1986,

provided he release USM from all claims arising out of his employment relationship with USM.

3. The gross amount of supplemental unemployment benefit payments to be made to a covered employee will be determined according to the following formula:

> One week's base pay for each full year of continuous service with USM, reduced by an notification pay

Limitations

Only salaried Roll Shop and Foundry employees who were actively employed at time of layoff are eligible. Any Roll Shop or Foundry employee who has quit, retired or been discharged for misconduct is not eligible, nor is a Roll Shop or Foundry employee in receipt of disability benefits unless he is medically able to return to work by the end of 1986 and is not offered a job with SHW Incorporated. Except as set forth in Paragraph 2, "Eligibility", any employee who accepts a job with SHW Incorporated is also not eligible for supplemental unemployment benefits. Any employee who does not accept an offer of a job with SHW Incorporated is also not eligible for supplemental unemployment benefits.

Effective Date

The Plan takes effect on February 1, 1986.

APPENDIX B

(Excerpts from Pages A 100 and A101 of the parties' Joint Appendix, Court of Appeals)

(The following statement of undisputed facts was filed with the plaintiffs' motion for summary judgment in the District Court and these excerpts were "deemed to be admitted" pursuant to Local Rule 9(c)(1) because they were not controverted by the defendants' Local Rule 9(c)(2) counter-statement)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Consolidated Master Docket
Number N-86-510 (AHN)

IN RE EMHART CORPORATION

All Cases

PLAINTIFFS' STATEMENT OF MATERIAL FACTS
ABOUT WHICH THERE IS NO
GENUINE ISSUE TO BE TRIED
(Local Rule 9(c)(1))

1. ...

27. Between December 17, 1981 and May 2, 1986, while there was no written plan, twenty-nine salaried employees were terminated involuntarily and not for cause (Defendants' supplemental response to plaintiffs' interrogatories, Fourth Set, interrog. No. 1, Appendix V). Twenty-five of these all received severance pay of at least one week for each year of

service (Defendants' response to interrog. No. 2 of the Plaintiffs' Fourth Set, Appendix V; document 1002 in Appendix F; and the affidavit of Donald Watt in Appendix T).

28. Of the four who don't appear to have received full severance, three clearly weren't eligible and don't belong on the list. Saddler was "laid off" and not "terminated" (document 10046, Appendix M). Jaske was also "laid off" (Jaske affidavit, Appendix T.2). Morris resigned and therefore was a voluntary termination, not an involuntary one (document 10045, Appendix L).

29. The last one, Shaffer, wasn't eligible either. He was in Houston, Texas, not Ansonia. There was dissatisfaction with his performance and he either resigned or was discharged for cause.

30. Six out of the twenty-nine received more than one week's pay for each year, but all of them (including Ken Irish) were at a "director" or executive pay level where larger benefits were part of the standard practice (Irish depo., pp. 104-106).

31. During the years since 1981 Irish was the only or principal person from Farrel who requested and obtained Roy Cowles' approval for severance payments. Irish testified that Cowles always approved his requests for one week pay for each year of service after Irish explained "about why the employee was being let go" (Irish depo. p 32).